

12-2479-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSHUA MARSHALL,

Plaintiff-Appellee,

-against-

P.O. SALIM RANDALL, Shield No. 15331, Individually and in His
Official Capacity, P.O. MICHAEL BURBRIDGE, Shield No. 15488,
Individually and in His Official Capacity,

Defendants-Appellants,

-and-

THE CITY OF NEW YORK, JOHN DOE, P.O.'s # 1-10 Individually and
in Their Official Capacities (the name John Doe being fictitious, as the true
names are presently unknown),

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

JOINT APPENDIX
Volume V of V (pp. A1204-1485)

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1 recovered with respect to this gun, would it be -- would you
2 -- would your office be able to test the DNA on the
3 cartridges?

4 THE COURT: Don't answer.

5 Q Could the cartridges yield DNA evidence?

6 THE COURT: Don't answer.

7 Q Is it possible to swab the evidence that is currently
8 present in the NYPD for the high yield testing that high
9 sensitivity testing that you just described?

10 A I'm not sure I understand the question.

11 Q If there are parts of this gun that were recovered that
12 were not swabbed originally, can they be swabbed today and be
13 submitted to your office for testing?

14 MS. CASTRO: Objection.

15 THE COURT: I'll allow it.

16 THE WITNESS: Yes.

17 Q So there are parts -- I withdraw that. Your office
18 hasn't been asked to test those items, have they?

19 A Not to my knowledge, no.

20 MR. COHEN: I have no further questions for the
21 witness. Thank you.

22 THE COURT: Any re-direct?

23 MS. CASTRO: Just briefly, your Honor.

REDIRECT EXAMINATION

24 BY MS. CASTRO:

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REDIRECT - MS. LAMOUSE-SMITH 66

1 Q You were asked on cross-examination if you received any
2 request from the prosecutor or from our office to test the
3 remaining samples, right?

4 A Correct.

5 Q Did you receive a request from the plaintiff, either
6 Mr. Norinsberg or Mr. Cohen, did you receive a request from
7 them to test the DNA?

8 MR. COHEN: Objection.

9 THE COURT: I'll allow it.

10 THE WITNESS: Not to my knowledge, no.

11 MS. CASTRO: Thank you.

12 THE COURT: All right. That will be all.

13 MR. COHEN: Can I have one more question?

14 THE COURT: Yes, you may ask your question.

RE CROSS-EXAMINATION

15 BY MR. COHEN:

17 Q As far as you know the reports that you have in front of
18 you regarding this case, you turned them over to defense
19 counsel just this week, isn't that right?

20 MS. CASTRO: Objection.

21 THE COURT: If you know.

22 A Well, there are two reports in this case. The first
23 report from 2008 was reported out in the normal course of
24 business once the file was reviewed. And then a request for a
25 certified copy of the file was made in 2011. And then

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RE CROSS - MS. LAMOUSE-SMITH 67

1 yesterday I had to prepare another report regarding my
2 testimony that was turned over to defense counsel.

3 Q And your report, just so the evidence is very clear here,
4 your report says there was an insufficient sample, correct?

5 A Yes.

6 Q It doesn't say oh, well, we have an extract which we can
7 do high sensitivity testing on, but we're not doing it?

8 THE COURT: Don't answer that.

9 MS. CASTRO: Objection.

10 MR. COHEN: Thank you. No further questions.

11 THE COURT: Thank you very much.

12 (Witness leaves the stand.)

13 THE COURT: Any further witnesses?

14 MS. CASTRO: No, your Honor, not at this time.

15 THE COURT: Any rebuttal witnesses?

16 MR. NORINSBERG: No, your Honor.

17 MS. CASTRO: The defense rests, your Honor.

18 THE COURT: All right. We've heard all the evidence
19 and now we'll hear summations. Do you want a short break?

20 MR. NORINSBERG: Yes, please.

21 THE COURT: Okay. Take a ten-minute break, please.

22 (Jury is out of the courtroom 11:27 a.m.)

23 (Continued on the next page.)

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1 THE COURT: You have a motion?

2 MS. CASTRO: Yes, your Honor. At this point, the
3 Defendants wish to renew their Rule 50 motion with respect to
4 the false arrest claim. Defendants submit that given all
5 their testimony, both in Plaintiff's case in chief as well as
6 in the Defendant's case in chief, there's sufficient evidence
7 to establish that there was probable cause for the arrest.
8 Specifically, Officer Randall testified that he observed
9 Plaintiff making the movements, removing an object from his
10 waistband, and throwing it. Officer Burbridge testified that
11 he saw the Plaintiff throw the gun. Officer Fox corroborates
12 that information.

13 He testified that he kept his eye on the Plaintiff's
14 associate the entire time. He had his hands up. It was
15 impossible for him to have been the one to throw the gun.
16 Based on that evidence, we submit to you that there was
17 probable cause for the arrest. For that reason, the false
18 arrest claim should be dismissed.

19 THE COURT: Denied. There's an issue of
20 credibility.

21 MS. CASTRO: With respect to the malicious
22 prosecution claim, Officer Burbridge testified that he only
23 spoke with the district attorney's office for five minutes in
24 preparation for his grand jury testimony. The only testimony

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1 that he gave in the criminal trial was at the grand jury.

2 Based on your Honor's charge that the Defendant
3 cannot be held liable for what he said to the grand jury as
4 well as to what he said to the prosecutor in preparation for
5 his grand jury testimony, we submit that the claim of
6 malicious prosecution should be dismissed against him.

7 THE COURT: Denied. It's an appropriate inference
8 that a well-advised prosecutor would have consulted with the
9 defendants during the course of this long prosecution.

10 MS. CASTRO: I do note for the record that there is
11 no evidence of that, your Honor.

12 THE COURT: Yes.

13 MS. CASTRO: We also move for a qualified immunity.
14 We renew this motion because again, based on the officer's
15 testimony that they observed the Plaintiff throw the gun or
16 what appeared to be the gun, based on the charge and based on
17 your Honor's belief that the reasonableness of their belief,
18 even if it had been mistaken, is grounds for a dismissal on
19 qualified immunity.

20 THE COURT: Denied. There's an issue of veracity.

21 MS. CASTRO: Thank you, your Honor.

22 MS. SANDS: Your Honor, one point. If the jury
23 should come back with a verdict against the officers, we ask
24 that we be allowed to submit a question or two of special
25 interrogatories that could be given to the jury before they're

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1 disbanded.

2 THE COURT: Denied. Bring in the jury. Too late.
3 We've had a long discussion of these problems.

4 (The jury entered.)

5 THE COURT: Be seated, please. You'll now hear the
6 summations, ladies and gentlemen. What the attorneys say is
7 not evidence, but they're going to try to help you analyze the
8 evidence, so listen carefully. You will not have any of what
9 they say read back.

10 Proceed, please.

11 MS. SANDS: Thank you.

12 MR. NORINSBERG: Thank you, your Honor.

13 Good morning, folks. Before we start, I just want
14 to extend thanks to you on behalf of everyone here. We
15 realize not just that you were giving us your time, but we can
16 see from the way you've been paying attention that you take
17 your job very seriously in this case. And you understand how
18 important the case is to us. So we want to just thank you for
19 doing that and really doing the job the best you can.

20 At this point, you've heard all of the evidence in
21 this case. And I understand, a lot of times, it's rapid-fire
22 questioning and things don't necessarily come in in perfect
23 order, but what I would like to do right now is simply walk
24 through the evidence with you, piece it back together in a
25 logical, coherent way, and present it to you. And then, you

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1 decide this case.

2 Now, in deciding the case, it seems to me the whole
3 case really comes down to one central issue, and that is this:
4 Did Joshua Marshall have a gun on him on May 15th, 2008?

5 Now there are some cases where you have multiple different
6 scenarios and possibilities. This isn't one of them. There's
7 no middle ground on this case. Either this man was carrying a
8 gun on him as he was charged with, or he wasn't. There's no
9 middle ground.

10 And I'm going to take it a step further here.

11 Because of the fact that the parties here completely
12 contradict each other on this critical fact, there is no
13 question that one side has lied in this courtroom. There's no
14 room for a third possibility. Somebody's telling the truth,
15 somebody's not. So the way I see it, as I'm framing the issue
16 before we talk about the evidence, is to put it back to you,
17 as jurors, to say your primary function here is to determine
18 who is telling the truth and who is not. Did this man have a
19 gun, or did he not?

20 Now, to make that determination, let's take a look
21 back at some of the testimony that we've heard in this case.
22 We're going to start with Officer Randall, the arresting
23 officer in this case. Now, you folks heard Officer Randall
24 yesterday morning. How did Officer Randall strike you? Did
25 he strike you as a credible witness? Did he strike you as

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1 somebody whose testimony was consistent with his prior
2 testimony? Did he strike you as somebody that can be relied
3 upon? How many times during the course of that
4 cross-examination, ladies and gentlemen, did we impeach this
5 officer with his prior testimony? And to be clear about it,
6 the questions that are being asked are almost verbatim
7 questions that last year, he gave one answer to; a year later,
8 he gives a completely different answer. How many times?

9 And not just that, but look at some of the things.

10 Last year, how many times did he answer under oath he can't
11 remember something. A year later, he comes in front of a jury
12 where it's not going to look so good to come in here and say
13 you can't remember. So all of a sudden, he comes up with a
14 new answer. How many times at his deposition last year did he
15 say he had no explanation for something? And then, he comes
16 before you folks, and all of a sudden, he has an explanation.
17 So that's just the general background.

18 Let's look at some of the specific things. He told
19 us that he actually saw Mr. Marshall in possession of the
20 firearm. Really? It's not what you said at your deposition.
21 At your deposition, you said you didn't see him in possession
22 of a firearm. And just so there's no doubt about it, let's
23 read the actual question and answer. This is on Page 58,
24 Line 20. "QUESTION: You never saw the object in
25 Mr. Marshall's actual, physical possession, correct?"

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1 "ANSWER: That is correct."

2 Well, what part of that is unclear? He was asked
3 point blank whether he ever saw it in his physical possession,
4 and he said no. He agreed it was correct. Now, if he never
5 saw this object in the physical possession of Mr. Marshall,
6 why did he swear under oath to a grand jury that he did see
7 it? I mean, those two stories aren't true; either you saw it,
8 or you didn't. Why did he tell the district attorney that he
9 saw this gun in the actual possession of Mr. Marshall?

10 He said those things. And then, he changes his
11 testimony during the course of these proceedings. It's
12 dishonest. The truth came out at his deposition. He never
13 actually saw the possession. How else do we know that? Think
14 about some of the statements that he made to other people.
15 Remember, folks, when I was asking him, I said, "Did you make
16 a statement to another prosecuting attorney that you never saw
17 him in possession of a gun?"

18 "What, who, what prosecuting attorney? Who are you
19 talking of?"

20 I said, "The prosecutor, Judy Phillips; did you make
21 a statement to her? Didn't you tell Ms. Phillips that you did
22 not see that gun in his possession? Didn't you tell her
23 that?"

24 "I never said that."

25 Then, I show him a document. And I said, "Sir, does

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1 that refresh your memory that you told Ms. Phillips that you
2 never saw this gun in his possession?"

3 "No, it doesn't refresh my memory. I never said
4 that."

5 Well, of course, he can't admit saying it. If he
6 admits he told prosecutor number two that he didn't see the
7 gun in Marshall's possession, then what he told prosecutor
8 number one was a lie. What he told the grand jury was a lie.
9 So he can't admit that he made that statement.

10 And then, I asked him, I said, "Sir, didn't you also
11 make a statement to the gun enhancement unit, your fellow
12 colleagues at the NYPD? Didn't you tell them you didn't see
13 this gun in his possession?"

14 "I never said that."

15 I said, "Well, that's funny. That's not what you
16 said at your deposition."

17 At your deposition, you said, "Actually, it's
18 possible I did say that. I can't really remember."

19 Now, how is it possible, if he's saying these things
20 now, he comes in here and he says that Marshall was in
21 possession of a gun, and yet, at his deposition, he said that
22 he wasn't. He tells this prosecutor, the second prosecutor,
23 he wasn't. And he tells the gun enhancement unit he wasn't.
24 Three different times, he said he wasn't. But you're supposed
25 to believe, the one time that he told the first D.A., that

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1 that's the true statement.

2 This whole case, it's about credibility. Your
3 job -- I told you this in opening statement -- it requires the
4 highest level of concentration to put together the pieces.
5 This isn't going to be easy. You have to work through this
6 evidence logically, think about these things. Why something
7 on such a critical fact, how does that change over time?

8 What's the next thing that he says? The next thing
9 he tells you, he tells you that he saw Marshall pull out the
10 gun. He saw him pull out the object from his waist. That's
11 funny. That's not what you said at your deposition, Officer.
12 At your deposition, you said you didn't see any object pulled
13 out of his waist.

14 And again, don't rely on what I'm telling you.
15 Let's look at the actual evidence. This is on Page 33 of this
16 man's deposition under oath. "QUESTION: The object that
17 saw him pull out of his pants?"

18 "ANSWER: I didn't see the object as he pulled it
19 out of his pants."

20 So if you didn't see the object as he pulled it out
21 of his pants, why did you tell the grand jury under oath that
22 you saw him pull a firearm out of his pants? That's a lie.
23 He lied. Now, you folks have the power. You can just look
24 the other way. And you can let him say it doesn't matter,
25 these things happen, or you can hold him accountable. He's in

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1 a court of law. What he told that grand jury is a lie. And
2 the truth only came out when we started this civil lawsuit
3 under oath.

4 What's the next thing he says? He says he actually
5 saw with his own eyes -- he's certain about this, too, there's
6 no mistake. He saw Marshall actually toss the gun away. Sure
7 you did, Officer, just like you saw Mr. Marshall's eyes
8 bulging from 150 feet away across the street in the dark,
9 right? Let's think about it. What actually did this man see?
10 He's sitting in the back seat of a car. He's got a driver in
11 front of him, he's got a passenger in front of him. He's up
12 to 25 feet away. And Marshall's back is towards him. How
13 exactly is he seeing this?

14 Of course, it doesn't make sense. That's why they
15 have to change the story ever so slightly. The story is
16 changed so that there's an angle and Marshall kind of twists.
17 Does that make sense? He's going to twist. Marshall's trying
18 to throw the gun away and hide it because he sees the police
19 coming. But here, Officer, look what I have, a gun. I'm
20 throwing it into the street. Does that make sense? You have
21 to use your common sense here. So much of this case is
22 thinking through the evidence and using logic and deductive
23 reasoning to work through it and figure out what's true and
24 what's not true. His whole story doesn't make sense.

25 But what's even more telling, look at the paperwork.

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1 This man's the arresting officer. Now, he said at his
2 deposition he has no idea why he's the arresting officer. To
3 this day, he had no idea. But he's the arresting officer.
4 Look at his arrest paperwork. He gives a version, he fills
5 out the form. There's a section on the form that actually is
6 a box called "DETAILS." I said, "Officer, you agree that the
7 detail of pulling out the gun in the waist; that's an
8 important fact?"

9 And he agreed, "Yes, that's important."

10 "In fact, it's very important, right?"

11 "Yes, it's very important."

12 "But why isn't it anywhere in your report?"

13 Now, in his deposition, he said "no particular
14 reason," but now he came into you, because he has to explain
15 it. It's going to look foolish, right? How is he going to
16 explain this? He explains, "Actually, we don't really fill
17 out that section. You know, we just kind of pass it on to the
18 D.A."

19 Really? Then why is there a section that says
20 "DETAILS" in large, capital letters? Why is it on the police
21 report if you don't fill it out? These are the most important
22 details of the entire case, that you saw him pull out the gun
23 and toss it. And you didn't put that on your report?

24 I'll tell you why he didn't put it on the report,
25 because at that point in time, he didn't have the details.

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1 They hadn't quite come up with exactly how they were going to
2 present this story. He didn't have those details. So that
3 section of the report's blank. I asked him also, "What about
4 the complaint report? You didn't mention anything on the
5 complaint report, did you?"

"Hey, don't blame me. That's not my complaint
7 report. You know, we all worked on that together. I didn't
8 write it."

9 Actually, you did write it. That's what you said in
10 your deposition. I said, "Who prepared this report?"

11 "I did." He prepared the complaint report. Then,
12 he starts telling me, "Well, you see, it's so busy. We have
13 all these documents we have to fill out and all these reports.
14 We all have to help each other out."

15 Really? What other documents? We've seen these
16 documents generated; an arrest report, complaint report and
17 memo book entry. It's not like they didn't have enough time.
18 The man got six hours of overtime. He filled out a report.

19 He just doesn't want to own it because it makes him look bad
20 because there's no explanation for why he didn't have those
21 details in.

22 But my personal favorite, the best one, was the last
23 one in the memo book entry. Does anyone here remember what
24 this man said at his deposition? He said he didn't know what
25 a memo book entry was for. This is an officer who's been on

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1 the force for eight years. Eight years, testifying under oath
2 in a deposition that he doesn't know what he's supposed to do
3 with a memo book. Come on, are you folks buying this? Are
4 you going to buy this? There's no way this man is telling the
5 truth in this case. It's one false, phony, dishonest claim
6 after another.

7 You can just look the other way and let it go if you
8 want, or you can hold him accountable. In our system, when
9 you testify under oath, it's serious business. This isn't
10 just playing fast and loose with the facts, change the story
11 if you don't like your answer last year at the deposition.

12 Just come in here. The jury won't know. They weren't there.
13 Come on, you folks know this. This is not right what he did.

14 And you go beyond and you look at the other witnesses
15 that we heard from, Officer Burbridge. Do you realize that
16 this man told two completely different stories? When he
17 appeared before the grand jury, one story. When he appeared
18 in the civil lawsuit, another story.

19 Let's look at story number one. This is what he was
20 telling to the grand jury. He testified under oath in front
21 of that grand jury that what happened was he had this
22 conversation with Marshall that he said, "Sir, can I talk to
23 you for a minute?" And then, what he did was he stepped out
24 of his car in front of Marshall, and that's when Marshall
25 threw the gun.

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1 So what he was selling to that grand jury, he was
2 trying to make it sound like, man, I had this guy in my line
3 of vision. He's standing there right in front of me. I saw
4 the whole thing. Then, all of a sudden, actually, come to
5 think of it, I wasn't standing in front of him on the
6 sidewalk. That never happened. Actually, come to think of
7 it, I was inside of a car 10 feet away still inside the car
8 when he threw the gun.

9 Well, which is it? First, this isn't a game you can
10 play with somebody's liberty and make up stories. How could a
11 story change so dramatically? This man's not taking this at
12 all seriously, understanding that when he testified in front
13 of the grand jury, he's under oath to tell the truth.

14 And his paperwork is also an illustration of how the
15 false and dishonest claims come in. Remember his form he
16 filled out, his stop-and-frisk form? That form, he said, "I
17 observed furtive movements before we made the stop."
18 Actually, that's not what you said in your deposition. At
19 your deposition, you said you didn't observe anything
20 suspicious.

21 And here's what he said, Page 66: "QUESTION: Did
22 you observe any furtive movements by Joshua Marshall before
23 you decided to stop him?"

"ANSWER: No."

25 So if the answer to that is no, why did you lie in

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1 your report so you could make it seem like you saw something
 2 suspicious? Why?
 3 Now, ladies and gentlemen, the other thing is it's
 4 not just that these officers have conflicted their own
 5 testimony, not just that they change their stories from last
 6 year, but there are two stories. Each time they tell it,
 7 there's conflicts between the two of them that make no sense.
 8 For example, they supposedly saw Marshall trying to make
 9 movements in relation to where Meade was standing. One
 10 version, he's going forward. He's trying to go forward.
 11 Meade stops, but he continues walking. Version number two,
 12 actually, he's going backwards. Well, which is it? Why is
 13 Officer Randall telling you one thing and Officer Burbridge
 14 telling you another? I'll tell you why, because it never
 15 happened.
 16 The truth is easy to remember. The truth is easy to
 17 remember. If you see something happening, why is it that they
 18 can't remember? More importantly, the most basic details --
 19 these officers are trained to make observations. That's what
 20 they told you, right? Why can't they tell the most basic
 21 thing? If you saw Marshall actually remove the gun, which was
 22 it? Was it his right hand? Did he pull it out with his right
 23 hand and throw it like that, or was it his left hand? Sorry,
 24 Counselor, can't really help you with that one. Was it the
 25 right side of his waist, the middle, or the left? Sorry, I

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1 don't remember that. They don't remember it because they
 2 never saw it. The whole thing, the only thing they saw is
 3 something ahead of them, 25 feet. They never saw what they
 4 claim they saw.
 5 Now, you heard this morning about the forensic
 6 evidence. We'll talk about that in one second or shortly.
 7 One thing I want to point out, you might have missed it during
 8 the trial, but there is a moment in this trial where this
 9 officer, the arresting officer, the critical question: Did
 10 he, himself, ask for any type of prints to be recovered? At
 11 his deposition, he said yes, "Yes, I did." Actually, no, you
 12 didn't. If you look at the complaint report that he prepared,
 13 there's a special box that says "prints requested," yes or no.
 14 He checked that box off "no" two times. Now, when he comes to
 15 court, he admits for the first time ever that he actually
 16 never requested fingerprints.
 17 Now, again, using your logic as jurors, using your
 18 intellect, what possible explanation would there be for why
 19 the arresting officer would not request fingerprint analysis?
 20 Why? Why wouldn't you do that? This is like the most routine
 21 police procedure. He told you his supervisor had instructed
 22 him that it should be done on every case. Why, on this
 23 particular case, did he decide not to? Because the last thing
 24 he wanted was to actually get the fingerprint analysis. It's
 25 the last thing he wanted. Because there's a very good chance

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1 he knows it wasn't going to be Marshall's prints on there.
 2 You heard about this on the forensic evidence this
 3 morning. Here's what I get out of it. When they actually
 4 tested this gun, first with the New York City Police
 5 Department, the entire barrel, they never bothered taking a
 6 swab. Now, here's a gun toss case. Somebody's taking a gun
 7 and throwing it. You don't take a swab of this part of the
 8 gun? There's six bullets inside there. You don't test any of
 9 those bullets.
 10 And then, the kicker of all, they actually have a
 11 sample right now. All along, they were claiming there wasn't
 12 a sample big enough to be tested. Actually, they have a
 13 sample. It's been sitting there all along, the entire four
 14 years of this lawsuit. If they really believed Marshall had
 15 this gun, why didn't they test it? Just prove it. That would
 16 blow this case out of the water, wouldn't it? If Marshall's
 17 DNA is on that gun, the case is over.
 18 But instead, what do they do? They wait until the
 19 week before trial when they first call in these witnesses to
 20 try to get their defense together here. Why didn't they call
 21 these DNA people a few years ago, and say, listen, we have
 22 this case going on. We want to show this man was in
 23 possession of the gun. Why didn't they do that? They told
 24 you this morning that the higher-sensitivity test can be done.
 25 The sample's still sitting there as we speak. Why wasn't it

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1 done?
 2 Now, up to this point what I've covered, I've
 3 covered with you the changing stories of these different
 4 officers. I've covered with you the things that are missing
 5 in the police reports. I've covered with you the forensic
 6 evidence or lack thereof. They can come up with all the
 7 excuses they want. The bottom line is there is absolutely no
 8 physical evidence connecting this man to this crime. That's
 9 what we've covered so far.
 10 But there's one other area I just want to cover with
 11 you, an area of just plain, common sense reasoning about their
 12 story. I want you to think about it for a minute. Think if
 13 this sounds logical. We have a police car pulling up to
 14 Mr. Marshall. And the police said, "Can we have a moment of
 15 your time?" Marshall, at that moment in time while the
 16 officer is standing there, that's when he chooses to take the
 17 gun out. But wait a minute. Marshall told you on the stand
 18 here that Meade was walking there. He said the cops are
 19 coming. Marshall acknowledged that he was aware of the police
 20 car coming down the street. Why on earth would he wait until
 21 the police car is right there and say okay, now's a good time?
 22 The police car comes up to him, "Can I have a moment
 23 of your time?" Sure, Officer, just one minute please. Let me
 24 just take this gun out and throw it. Okay, yeah. What would
 25 you like, Officer? Does that sound right? Does that make

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1 logical sense? He's going to wait until the cop car is right
 2 there. If he knew the cop car was coming, wouldn't he have
 3 been just tossing it away before they came?
 4 The other thing that doesn't make sense, which we
 5 touched on a little bit on earlier, why on earth would he be
 6 turning around to face the officers? First of all, if you're
 7 trying to conceal that you have a gun, why are you turning around
 8 all? You're trying to do it in this direction. But more
 9 importantly, if you were turning around and take out a gun,
 10 you know that's pretty dangerous. You'll be shot on sight by
 11 a police officer if that happened, if an officer sees somebody
 12 coming out, turning with a gun.
 13 I'm only pointing out to you, as I've tried to
 14 throughout the trial, logic and common sense. It doesn't make
 15 sense. Their story doesn't make sense. Why doesn't it make
 16 sense? It's a fabrication. They didn't really think it
 17 through clearly. They just came up with their story, and
 18 they're stuck with it. That's why it doesn't make sense.
 19 It's illogical. It could not have happened that way.
 20 And so when you put it all together -- and this is
 21 what I am asking you to do. I'm not asking you to make any
 22 quick decisions. I want you to think through carefully, but
 23 put together the changing statements. Put together the
 24 omissions in the reports. Put together the complete lack of
 25 forensic evidence. And then, use your common sense and see

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1 Put it all together.
 2 And then, you start to understand why this case got
 3 dismissed in May of 2009. Think about it, ladies and
 4 gentlemen. This should've been an open-and-shut case. You
 5 have two police officers swearing under oath that they saw
 6 this man move a gun. What else is there to decide? And yet,
 7 this case is thrown out. Why? Because they have massive
 8 credibility problems; because the arresting officer keeps
 9 changing his story over and over again; because his partner
 10 keeps changing his story over and over again; because they
 11 know there's no way this case could be presented to a jury at
 12 trial. This case just fell apart at the seams because of all
 13 these credibility issues.
 14 Now, what really happened here? What really
 15 happened? I'll tell you what happened. It's exactly as you
 16 heard it from Mr. Marshall. Meade saw the cop car coming
 17 first. Meade's the one that panicked. He's the one that said
 18 he's got to just get near his buddy and ditch the gun so the
 19 cops wouldn't know. And you know what, folks? It worked
 20 perfectly. He got off the hook and Marshall did his time.
 21 Marshall did four and a half months in a jail for a crime he
 22 didn't commit. It was Meade's gun.
 23 Now, if you folks were to say well, we understand
 24 maybe the officers were mistaken, that's not a possibility in
 25 this case. They've repeatedly sworn under oath that they saw

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1 Marshall with a gun. If they just owned it at the beginning
 2 and just admitted the truth, that the truth is they did not
 3 see what happened. They got there split seconds too late,
 4 three or four seconds too late. All they heard was the gun.
 5 That's why both men were thrown against the wall; that's why
 6 both men were handcuffed; that's why they had to have their
 7 little meeting to decide what to do.
 8 And this nonsense that otherwise, they would just
 9 take two people in and interrogate them, what a bunch of
 10 nonsense. If they took both of those people in, what would
 11 happen is they would have to admit they didn't actually see
 12 who threw the gun, case over. So they just made a spot
 13 decision, 50/50, odds are it's one of them. Anyway, what are
 14 they doing out here? They just made a judgment. They were
 15 judge and jury right on the scene, and took this man's liberty
 16 away.
 17 If they just owned it, if they were honest and just
 18 told the truth, this wouldn't have happened. The truth would
 19 be going to the prosecutors and saying we heard the gun. We
 20 got there split seconds later. We believe it's this guy, but
 21 we're not sure. We need to do further evaluation. That
 22 would've been the honest thing to do. Instead, they took this
 23 man's liberty away and threw him in jail. And he rotted there
 24 for four and a half months in the summer of 2008 for nothing,
 25 because he didn't do this crime.

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1 This man's innocent. He didn't do this crime. It's
 2 Meade's gun. And all we're asking you to do is hold these
 3 officers accountable. They knew what they were doing, but
 4 they didn't lose any sleep over it. You know why? They
 5 figured the ends justified the means. You know what? We got
 6 the gun off the street, great. The problem with that argument
 7 is you got the wrong person. The person who actually had the
 8 gun is going home that night. And Lord knows, he probably has
 9 another gun and will be out on the street the next day. The
 10 guy who was actually innocent is the one that does the time
 11 for it. It's wrong. The whole thing's wrong.
 12 The last thing I want to cover with you and -- two
 13 last items I want to cover with you, and I'll conclude. The
 14 defense in this case; what have we learned about the defense
 15 here? We have learned here that approximately four years
 16 after this incident, just last week, the defense attorneys in
 17 this case decided actually, you know what, we're going to
 18 trial. We better reach out to some witnesses and help bolster
 19 the claims here. You know why? They did that because they
 20 knew they have big problems in this case. They knew that if
 21 they just rely on Randall and Burbridge, they're going down.
 22 So what do they do? First, they call Officer Fox,
 23 the star witness for the defense, the guy who's going to clean
 24 up the whole mess and just make it all good again, right?
 25 What is this man who they never even called this guy for four

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1 years? No one ever talked to him. This man was so
2 unimportant that the D.A.'s office never interviewed him, let
3 alone him testifying in front of a grand jury. And this guy,
4 he comes in here. What's the one thing, the one undisputed
5 fact we get out of him? He didn't see who threw the gun. He
6 did not see who threw the gun. That's the number one fact,
7 and with good reason.

8 The man's driving the wrong way down a one-way
9 street at night in an area where you have several stores that
10 are open 24 hours, and of course he's paying attention to
11 what's ahead of him. He's not looking. What did he actually
12 remember? This man said he did thousands of arrests, over a
13 thousand in his career. And yet, four years later, he's
14 contacted for the first time. And wouldn't you know it, he
15 just remembers in great detail this particular case. Of
16 course, it comes out that his memory was somewhat refreshed
17 when he was able to meet with the lawyers from the Defendant
18 in this case.

19 And we're seeing what happens here. We saw an
20 example with Officer Burbridge. Remember, I questioned him
21 yesterday about this. During his deposition, Officer
22 Burbridge couldn't think of the right answer. We had a break
23 and all of a sudden, the answers came flowing. We saw how
24 Officer Randall was only too happy to adopt the term, his
25 "associate." He started using that in his direct after hearing

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1 it from the lawyer. My point is this: How real is that
2 testimony? It's four years after the fact meeting with their
3 lawyers. And at the end of the day, it really doesn't change
4 any of the dynamics in this case at all.

5 The one part, I don't know if you believe it, I
6 don't think this guy actually saw anything. Even if you
7 believed his story they saw Meade's hands, that just would
8 make perfect sense to this whole story of what happened.
9 Meade is going along. He's the one that tosses the gun. He's
10 the one worried about the cops. Officers, look, I got nothing
11 here. What normal person would walk down the street, and when
12 police are coming, would go like this? That doesn't make
13 sense. He's doing it because he's got the guilty conscience.
14 He knows he just tossed that gun. He wants to make sure the
15 officers think it's not him. And guess what? It worked. It
16 worked.

17 The bottom line is this, ladies and gentlemen. Your
18 questions are going to come down to what they call a verdict
19 sheet. I'm just going to walk through this very briefly with
20 you. You'll get it again. You're going to have copies of it.
21 You'll have a chance to go through this extensively.
22 Essentially, there are three main questions: Was Mr. Marshall
23 falsely arrested by these two Defendants; was he maliciously
24 prosecuted; was he denied a right to a fair trial by the false
25 evidence?

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1 Now, I suggest to you all of those questions turn on
2 the very first thing that we talked about when I started my
3 closing argument today: Did Marshall have a gun on him? If
4 Marshall did not have gun on him, if the answer to that
5 question is no, he did not have a gun, then the answer to all
6 of the questions on the verdict sheet is yes. Now, if
7 Marshall actually had the gun, if you still believe that after
8 everything you've heard, then of course, he's not entitled to
9 anything. You throw him out. That's your job as jurors.

10 But if you actually think through this and believe
11 that these officers gave false information to the prosecutors,
12 they duped the prosecutors because the prosecutors weren't
13 on the street. They duped it and put it over on the grand
14 jury with these false stories. If you believe that's what
15 happened, then the Marshall to not having a gun, the answer
16 all the answers on the verdict sheet is yes. It's yes.

17 And then, you'll see there's a question. When
18 they're talking about maliciously prosecuting, just so you
19 understand, our view is simply this: They're feeding false
20 information. They may not be the prosecutors, per se, but
21 they're feeding that information. Now, one thing on the first
22 two questions on false arrest. Let's say some of you -- and I
23 know there's room for a healthy discussion about all this case
24 and the facts. It's not like the attorneys --

25 MS. CASTRO: Objection.

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1 THE COURT: You may continue your argument.

2 MR. NORINSBERG: -- defense counsel got up in your
3 opening and said this is just an open-and-shut case. We
4 actually want you to think about it. When you think about it,
5 let's say some of you still are not sure. You don't know
6 where you are. The first questions, the first two questions
7 on false arrest, the Defendants actually have the burden of
8 proof on those questions. You'll hear that from the judge.
9 They have the burden to prove that they had grounds to arrest
10 Marshall, not us. We have the burden on the other two claims.
11 But on those first two questions, for some of you, if you're
12 not comfortable with that, they have the burden. If they fail
13 to meet their burden, they lose on that claim.

14 Now, you'll see the sections on compensatory
15 damages, I don't even want to touch that with you. I want
16 this case -- I don't want to taint this about this case being
17 a money case. This is about holding these officers
18 accountable. Whatever value you put on it is fine. It's
19 about showing that you were not fooled like these other
20 people. You weren't misled like the grand jury. You see the
21 light here. You understand what happened.

22 But there's one section, the last section on
23 punitive damages, that I do want you to take very seriously.
24 Punitive damages gives you an opportunity to speak your voice
25 and actually be heard as a juror. You can send a message to

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1 these two Defendants.

2 MS. CASTRO: Objection.

3 MR. NORINSBERG: You can send a message.

4 THE COURT: You may continue your argument.

5 MR. NORINSBERG: You can send a message through

6 verdict, not just to these two Defendants, but to any other

7 police officer out there that thinks it's okay to get in front

8 of a grand jury and lie. You can send a message to any

9 other police officer out there that thinks it's okay.

10 THE COURT: Strike that reference to before the

11 grand jury.

12 MR. NORINSBERG: You can send a message to any other

13 police officer that thinks it's okay to tell a prosecutor

14 something that's completely false, and say, you know what, you

15 can't do that. You actually cannot do that in our system.

16 You will be accountable. And that's what we're going to ask

17 you to do at the end of the day is listen to all of the

18 evidence, work through it carefully. But if you do that and

19 you honor the pledges you made in your jury selection, you're

20 going to get the right result, and that's to hold these two

21 Defendants responsible for putting this man in jail for four

22 and a half months. Thank you.

23 THE COURT: Thank you. Lunch will be up at 12:30.

24 Do you want to take a break now, and then get back here at

25 about quarter after one, take a break now? We'll continue at

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1 a quarter after one. Don't discuss the case.

2 (The jury exited.)

3 THE COURT: You have the jury charge with all the

4 corrections. And we've run off copies for the jury later.

5 Enjoy your lunch. I'll see you at 1:15.

6 (A lunch recess was taken.)

7 (Continued on the next page.)

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1 (Honorable Jack B. Weinstein takes the bench.)

2 (Jury is in the courtroom at 1:20 p.m.)

3 THE COURT: Be seated, please. Proceed.

4 CLOSING STATEMENT BY THE DEFENSE

5 MS. CASTRO: Good afternoon, ladies and gentlemen.

6 JURORS: Good afternoon.

7 MS. CASTRO: I want to start off by thanking you for

8 your careful attention that you paid throughout the course of

9 this trial. On behalf of my client, Police Officers Michael

10 Burbridge and Salim Randall, as well as my co-counsel, we

11 would like to thank you for the careful attention that you

12 will also give to your deliberations in deciding this case.

13 Now, I do have some remarks that I want to go

14 through and discuss our case, but I want to start off by

15 addressing some of the points that were made by plaintiff's

16 counsel in his summation a little while ago.

17 Now, first off, with respect to Officer Randall,

18 plaintiff's counsel started off by trying to attack his

19 credibility. He wanted you to believe that he's not a

20 credible witness and he gave you a few reasons for that. One

21 of the first reasons he gave you is because he says that there

22 are inconsistencies in his testimony.

23 Now, as plaintiff's counsel went through and told

24 you repeatedly, this happened four years ago. Four years ago

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1 is a long time to remember every single detail of what

2 occurred. However, the evidence has shown that Officer

3 Randall is consistent in the important facts of this case. He

4 knows what he saw and he knows what he heard. He knows that

5 he saw the plaintiff pull an object out of his waistband, make

6 a pitching motion, and he tossed it. He knows that he heard

7 the sound of the metal cling on the ground. He said that that

8 is the most unmistakable sound that he knows for a fact that

9 that's the sound of a gun hitting the ground. He's been

10 consistent throughout his testimony in saying that.

11 Now, the second reason he wants to attack Officer

12 Randall's credibility is because of his paperwork, his arrest

13 paperwork, to be specific. And he spent a lot of time harping

14 on the detail section of the arrest report. He wants you to

15 believe that that section was left blank, that was his word,

16 that was counsel's word, that he left that section blank, that

17 he didn't put any information about what happened.

18 Now, he didn't show you that paperwork during

19 summation, but it was admitted into evidence and you're going

20 to have a chance to review it. Now, that arrest report is

21 Plaintiff's Exhibit 6. And the detail section, if you look at

22 it, says at TPO, which is time, place of occurrence, above

23 defendant named Joshua Marshall was found in the possession of

24 a loaded firearm, and it even specifies a serial number.

25 That's not blank. That's a play on his words. And it's a

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1 play of words that's happened throughout the course of this
2 testimony.
3 You were here when you heard the testimony of
4 Officer Randall, when he was questioned by plaintiff's
5 counsel. Mr. Norinsberg stood right there and he asked him
6 multiple questions and he tried to impeach him using his prior
7 testimony. And a specific example of that attempt to impeach
8 is when he asked him whether it was dark when it was dark
9 night and Officer Randall answered that it was.
10 Now, the testimony that he gave was consistent.
11 However, counsel skipped some of the questions in his
12 deposition to make it seem as if he was being inconsistent.
13 And the specific questions that were asked. Question: Was it
14 dark out at that time? Answer, yes. The next question that
15 he skipped and had to be corrected to include: Was there
16 any lights on, on the street? Answer: Yes. Question: Where
17 was the closest lights from where Mr. Marshall was standing?
18 Answer: I can't recall. And then he skipped the question:
19 Were there any lights on the street where the answer was "yes"
20 to make it seem as if it was dark and that he couldn't recall
21 that there were any streetlights close to where the plaintiff
22 was standing.
23 That's just another tactic, another play on his
24 words.
25 Another play on his word goes to the memo. Now, he

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1 talked about how Officer Randall said at his deposition that
2 he doesn't know what a memo book entry was for. Now, the memo
3 book is in evidence; and again, you have a chance to look at
4 it. But just to point out to you there is an entry for this
5 incident and this is in evidence as Plaintiff's Exhibit
6 Number 1. That memo book entry reads: 0045, which is 12:45
7 a.m. Marshall, Joshua placed under arrest for CPW, means
8 criminal possession of a weapon in the second degree.
9 He knows what a memo book entry is for. He's got
10 the information right here. This is another play on his
11 words.
12 Now, he talked a lot about the fingerprint request
13 and how that request was not made on the complaint report
14 filled out by Officer Randall. Now, we've heard testimony
15 first in the opening, beginning with plaintiff's opening that
16 there was fingerprint testing done. So what's the big deal?
17 The big deal is that it is a play of his words. He wants you
18 to think that Officer Randall didn't do his job, that Officer
19 Randall didn't fill out the paperwork, he wants you to think
20 that Officer Randall was hiding something, but the fact is
21 this morning you heard from Police Officer Sena from the
22 evidence collection team. He told you he got a request to do
23 the fingerprint check and he did do that check. Another play
24 of words from the plaintiff.
25 There's another document in evidence that's of

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1 significance, because plaintiff's counsel has harped on the
2 fact that nowhere in the paperwork did the officers note that
3 this man had a gun and that he tossed it. That isn't -- that
4 is in the paperwork. And again, it's a document that you can
5 look at, it's in evidence, Plaintiff's Exhibit 11. It's the
6 UF-250 report. He showed you this document but he didn't
7 point out this important fact. What did he point out? He
8 pointed out that Officer Burbridge checked off that they
9 referred to movement. What he didn't point out to you is in
10 the handwriting, and what it says is that the plaintiff was
11 observed throwing a firearm to the ground. That's an
12 important detail that he skipped.
13 Now, plaintiff's counsel also wants you to think
14 that inconsistencies in the testimony means that officers are
15 lying. Again, it happened four years ago and the defendants
16 have maintained their testimony is consistent.
17 (There was a brief interruption - a juror was
18 coughing)
19 MS. CASTRO: Now, counsel spent a good amount of
20 time talking about the fact that he thinks the defendants'
21 story doesn't make sense. I'm going to tell you whose story
22 makes no sense, the person whose story makes no sense is the
23 person in this room who is lying, is the plaintiff. His story
24 makes absolutely no sense. And there's many different parts
25 of the story that we can break down and look at how it makes

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1 no sense.
2 First off, let's start off by talking about the
3 associate. He's walking down the street with the associate,
4 and they told you that he parted ways. He also told you that
5 for no reason at all the associate comes back and tells him,
6 warns him police are coming. Well, the associate was the one
7 carrying the gun. Why would he come back to where the police
8 are coming? Why would he put himself in a position to get
9 caught if he was carrying a gun? That makes no sense, but
10 that's his story.
11 What's the other part of the story that makes no
12 sense? Well, he wants you to think that when the officers,
13 you know, came upon the scene they ran out of the car and
14 said, "whose gun is it? Whose gun is it?" First of all,
15 there is no evidence that that question was asked. He's the
16 only one that's telling you that the officers were saying
17 whose gun is it. But if the officers don't know whose gun it
18 was, Officer Burbridge told you what would happen in that
19 situation; both of them would have been arrested. They would
20 have been taken back to the station house and they would have
21 been questioned.
22 Now, plaintiff's counsel said well, that's nonsense.
23 But guess what, he's got no evidence to refute that. Nobody
24 came here and said that's not how it works. That is how it
25 works, that's the evidence. His story makes no sense.

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1 Now, there are three things in this case and it is a
 2 simple case, as my co-counsel told you in the opening
 3 statement yesterday, it is a simple case. The story is about
 4 three officer from the Brooklyn North Anticrime Unit, they
 5 were on patrol and they see two men walking down the street.
 6 One of these men is observed pulling a gun from the waistband
 7 and tossing it. That's the whole case. That's it. He was
 8 arrested because of that. That's the only reason why.
 9 Plaintiff's first claim is the false arrest claim.
 10 Now, for this claim the only relevant question you have to
 11 answer is whether there was probable cause for this arrest.
 12 Probable cause, Judge Weinstein will instruct you, means that
 13 there was a reasonable belief the officers believed that the
 14 plaintiff had or was committing a crime. You're going to
 15 receive a verdict sheet at the end of the summations and
 16 you're going to use this verdict sheet to inform us of your
 17 decision. For the first two questions of the verdict sheet
 18 1-A and 1-B pertain to whether the officers falsely arrested
 19 the plaintiff on May 15, 2008. And we submit to you the
 20 evidence shows that the answer to these two questions should
 21 be "no."
 22 Now, by now you've heard that the standard of proof
 23 in this case is different from a criminal case. In a criminal
 24 case the standard of proof is beyond a reasonable doubt to
 25 determine whether somebody's guilty or not guilty. You're not

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1 here to do that. The standard of proof in this case is by a
 2 preponderance of the evidence. And what that means is that if
 3 you've got the scales of justice weighing the evidence that
 4 was presented by plaintiff and the defendant, that if the
 5 scale tips slightly in the favor of the defendant, then on
 6 this claim you must find for the defendant.
 7 So with that in mind, let's talk about how the
 8 officers had probable cause. You heard testimony from the
 9 three officers who were out on parole on May 15, 2008. You
 10 heard that yesterday. What they told you is they observed the
 11 plaintiff remove an object from his waistband. Officer
 12 Burbridge told you that he specifically saw the plaintiff
 13 remove the gun. He tossed it. Officer Randall will tell you
 14 that he saw that movement from his vantage point, he saw the
 15 movement. He saw the pitch and then he heard the sound. The
 16 third officer, Officer Fox told you that he had his eye on the
 17 associate the whole time and the associate had his hands up
 18 before the sound of the gun hit on the ground. There's no
 19 doubt in the officers' minds that that's what they saw and
 20 that's what they heard, no doubt.
 21 Now, the plaintiff wants to question whether the
 22 officers actually saw him throw this gun. We submit to you
 23 that the evidence is perfectly clear that they saw him with
 24 that gun, saw him throw that gun. They're not mistaken about
 25 that. It wasn't the associate's gun, it was his.

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1 Now, according to the plaintiff and only the
 2 plaintiff, the associate threw the gun and the officers said,
 3 whose gun is it? We saw no other evidence than his testimony.
 4 And it's your job to weigh the testimony and decide who's
 5 credible and who's not credible.
 6 Officer Randall told you what he heard and what he
 7 saw. Officer Burbridge told you what he saw and what he
 8 heard. Officer Fox told you what he saw and what he heard.
 9 There was no doubt in their mind that they saw that man with
 10 the gun.
 11 Now, following this arrest the plaintiff was taken
 12 to the 83rd precinct. And you heard from the plaintiff that
 13 on the ride back the officers even told him that they saw him
 14 with that gun. Once back at the precinct the paperwork was
 15 completed and the request for the fingerprints were made. And
 16 we know that because Officer Sena told us that when he got in
 17 or when his partner got in at 6 a.m. there was a message
 18 request that fingerprints were needed and they went to the
 19 precinct and they collected that gun and they fumed it for
 20 prints.
 21 Ladies and gentlemen, we submit to you that because
 22 of the officers' observations and because of what they heard,
 23 there was probable cause for that arrest. For that reason, we
 24 ask you to check "no" on the two questions as to whether
 25 Officer Burbridge and Officer Randall falsely arrested the

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1 plaintiff.
 2 Now, plaintiff's second claim. And actually, before
 3 I get to that. There was one part in the plaintiff's
 4 summation that he left out entirely, and that crucial part
 5 that he left out is what's the motive? What's their reason
 6 for wanting to pin this gun on this man if they know that
 7 somebody else threw it? What's the reason for that? They
 8 can't give you a reason because there is no reason. None.
 9 There is no evidence of that. The only reason is because
 10 that's what they saw.
 11 Let's talk about plaintiff's second claim, and
 12 that's the malicious prosecution claim. The first part that
 13 you need to decide to determine whether or not the officers
 14 maliciously prosecuted him is whether there was probable
 15 cause. And as I already explained to you, there was. There's
 16 no doubt they saw him take the gun from his waistband and
 17 throw it. And there's a second part to the malicious
 18 prosecution claim, and that goes to the timing of when the
 19 officers speak to the District Attorney's office. So the
 20 Judge is going to give you instructions about how to come up
 21 with your decision about this claim. But one of the
 22 instructions that he will tell you is that --
 23 MR. NORINSBERG: Objection. We'd ask that all
 24 instructions be from the Court not from counsel.
 25 THE COURT: You may continue.

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1 MS. CASTRO: One of the instructions that the Judge
2 will give you is that the defendant cannot be held liable for
3 what he says to the grand jury. He cannot be held liable to
4 what he says to the prosecutor if it's not his preparation for
5 a statement to the grand jury.

6 Now, yesterday when you heard from Officer
7 Burbridge, he told you he spoke to the prosecutor for five
8 minutes in preparation of his grand jury testimony, and then
9 he went in and gave his testimony for the grand jury and had
10 no further involvement in the prosecution. That hasn't been
11 refuted. There's no evidence to say that didn't happen. For
12 that reason we ask you with respect to the plaintiff's
13 malicious prosecution, which are going to be questions 2-A and
14 2-B on your verdict sheet, 2-B pertains to Officer Burbridge,
15 we ask that you check off "no".

16 Let's talk about Officer Randall. Now, he did speak
17 to the prosecutor right after the arrest and he told the
18 District Attorney's office the same thing that he told the
19 grand jury and that he said at his deposition, and the same
20 thing that he told you here. And what he said was that he
21 observed the plaintiff remove the object from his waistband,
22 toss it, and he heard the sound of the gun. There's no
23 evidence to refute that that's what he said to the District
24 Attorney. They didn't put on a witness from the District
25 Attorney's office that says that that's not true. It's

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unrefuted.

And there's one more component to the malicious
prosecution claim, and that component is malice. The
plaintiff has the burden of showing that the officers acted
with ill will with personal hostility to the plaintiff. As I
told you before, there is no motive. There's no evidence that
they had any ill will towards the plaintiff. There's no
evidence that they disliked him. There's no evidence in this
trial that they even knew him. There's no malice. For that
reason we ask you to find that they did not maliciously
prosecute him.

Now, you've heard from plaintiff as well yesterday
that he told you that he voluntarily testified at the grand
jury, and even after the grand jury heard his story, they
still decided to indict him. They indicted him on three
counts of criminal possession of a weapon.

Now, yesterday the Judge told you that just because
the grand jury indicted him doesn't mean that he's guilty.
And likewise, just because the criminal charges were dismissed
in this case, that doesn't mean that the officers didn't see
him toss that gun. That doesn't mean that the officers didn't
have probable cause to arrest him. So again, for these
reasons, we ask you to find the officers not liable for
malicious prosecution.

Now, as to plaintiff's third claim, he's claiming

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1 that he was denied a fair right to a trial. Now, the Judge is
2 going to tell you that the plaintiff must prove that the
3 defendant knowingly created false evidence and presented that
4 to the prosecutor, and that that evidence was a deprivation of
5 his liberty.

6 However, if you believe that the defendants
7 presented accurate information to the prosecutor or presented
8 inaccurate evidence without the requisite intent, then you
9 must find for the defendants on this claim.

10 Now, again, ladies and gentlemen, the plaintiff has
11 not and cannot show you that either of these officers made any
12 false evidence that led to the deprivation of his liberty.
13 They can't do that. There's no proof of that.

14 So now let's talk about the forensic evidence in
15 this case. You heard from two individuals this morning that
16 talked about fingerprints and DNA. Now, plaintiff's counsel
17 would like you to believe because there was no DNA or
18 fingerprint, that that must mean that the gun was not the
19 plaintiff's or that he didn't handle the gun. That's
20 incorrect. First of all, this isn't CSI, this isn't Law and
21 Order, that is real life. And in real life, as you heard
22 today, you don't always get forensic evidence and there are
23 different reasons why. Starting with Officer Sena, he told
24 you that he almost never gets fingerprint on a gun. And the
25 reason for that is because the surfaces of the gun. Here, the

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1 handle of the gun was brutish, very difficult to get a
2 fingerprint. Not just plaintiff's fingerprint, there weren't
3 fingerprints of the officers. No prints. That doesn't mean
4 he didn't handle that gun.

5 You also heard from a criminalist from the medical
6 examiner's office. Now, she told you that the swabs of the
7 DNA were tested -- well. They couldn't test them, because
8 there was an insufficient sample. That didn't mean what
9 plaintiff wants you to believe. And again, that's a play of
10 his words. What that means is because there was not enough
11 evidence, not enough DNA for them to test, not enough DNA to
12 match him; but again, that doesn't mean he didn't handle that
13 gun, it doesn't mean that the officers didn't see him toss
14 that gun.

15 One of the things that plaintiffs had in summation
16 was that the defense or the prosecutors, they didn't test the
17 sample that you heard is still in the lab. Well, guess what,
18 they could have asked for that test and they didn't either.
19 So it's a play of his word.

20 Now, ladies and gentlemen, when you retire to your
21 deliberations, keep in mind there's only one person here who
22 has motive, motive to lie. That's that man right there.
23 What's his motive? He wants money. He wants you to give him
24 money. Think about that when you are deliberating.

Now, this is going to be my last opportunity to

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1 speak with you. After I sit down you'll hear from the
2 plaintiff's counsel and he'll get to tell you his last word,
3 he'll try to refute what I told you, but I want you to
4 carefully consider the evidence and come to your own
5 conclusion. Who do you believe?

6 Thank you again for your time and attention. We
7 hope that you find in favor of the defendants, Police Officers
8 Salim Randall and Michael Burbridge. Thank you very much.

9 THE JURORS: Thank you.

10 THE COURT: Thank you.

11 CLOSING REBUTTAL STATEMENT BY THE PLAINTIFF

12 MR. NORINSBERG: Folks, you're almost done. You're
13 almost there. I have a few brief remarks, just a few points I
14 want to hit on and then we'll turn it to the Judge to give you
15 instructions of law.

16 A few things here. This notion that it happened
17 four years ago and that's why Officer Randall can't remember
18 Come on, folks, he testified just last year, the
19 inconsistencies are what he testified to a year ago and today,
20 so I think that's not a reasonable argument at all. We're not
21 talking about what he couldn't remember four years ago, it's
22 changing what he said last year to this year.

23 The reports, the key issue on the reports is simply
24 this: The important fact of seeing the gun move and throwing
25 the critical words are nowhere in the arresting officer's

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1 report. So there is a bit of a subterfuge to sort of -- if
2 you can talk about other things, that's what the issue is in
3 this case. If he actually saw these things, they weren't in
4 the report.

5 This notion about motive and reason, let me just
6 address this. First, the Judge is going to instruct you that
7 in terms of malice, the mere fact, if you find as jurors that
8 the officers lack probable cause, you can infer malice. You
9 don't have to think that they were out to get this guy. Just
10 the fact that they lacked probable cause is sufficient to
11 conclude malice.

12 And what happened in terms of what happened here?
13 These officers had an indifference, it didn't matter about
14 what happened here, it's not that they're out to get one of
15 these guys or the other, it's much more the fact that you have
16 two men on the street, one of them must have this gun, and
17 we'll get one of them and the other one is probably up to no
18 good anyway. The fact that Mr. Marshall is staying at his
19 aunt's house on that street, they're not aware of that, they
20 don't care about that, it's indifferent. The malice can infer
21 from the lack of probable cause, the Judge will tell you that.

22 Now, this idea that the plaintiffs could have tested
23 the DNA. You heard this and it came at a subtle point, but an
24 important point that the report was just written this past
25 week. The report never mentioned the fact that there was

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1 still an extract. The first time that any of us hear that
2 today is from this witness. That's the first time we learned
3 they actually had an extract. All along they claimed that
4 there was an insufficient amount. In fact, the first time we
5 hear about it is today.

6 If they truly believed this man was in possession of
7 that gun, why on earth didn't they have that extract tested?
8 They have the ability. It's just -- all the witness said was
9 that it's not with our standard protocols, it's not enough,
10 but they have higher sensitivity testing. They had four years
11 to do this, folks, why wouldn't they do it? Why wasn't it
12 done?

13 Now, you also were told about the meet -- whether or
14 not there was discussions with the District Attorney. Here's
15 a very important piece of evidence you have in there, there's
16 a complaint, an actual criminal complaint. And if you
17 remember Officer Randall on the stand, I actually showed him
18 that complaint and I said, did you make the statement in this
19 complaint, did you tell the District Attorney this? And he
20 said yes. And that's why it's in evidence, so you can take a
21 look at that and see.

22 Now, with respect to the grand jury. Yes, we know
23 the grand jury has indicted, that was something we talked
24 about in opening statement. The real question is why did they
25 indict? They indicted because they were told something that

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1 turned out to be completely different. They were told by
2 Officer Burbridge that he was actually standing in front and
3 seeing this man throw a gun. Of course they are going to
4 believe that. Understand the fact that when you heard it from
5 Mr. Marshall, he's not allowed to ask him questions, the only
6 person questioning in that room is the prosecutor. But when
7 the truth came out; you, as jurors, heard much more than they
8 ever heard, and you know much more, and I think you're in a
9 better position to make a decision on this case.

10 You also heard some reference to what Officer Sena
11 did in the testing, the fingerprint testing. But again, we
12 learned for the first time today, now, that this is the first
13 time in the four years that he said that he didn't actually
14 test the bullets, and why did he not test the bullets, what
15 did he say? He told us, well, this was a possession case, so
16 we only test the gun. But who put the bullets in the gun?
17 Logically, wouldn't that be the thing that you do? Some human
18 being did that. Whoever put the bullet in the gun had
19 possession of the gun.

20 The thing I want to talk about, ladies and
21 gentlemen, this incident happened four years ago. Four years
22 have gone by. To this date these officers have never once
23 been held accountable for what happened that night. Four
24 years have gone by. They have never been held accountable for
25 what they told the prosecutor for the statements they made,

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	113	PROCEEDINGS	114
1	for the fact that that man spent four and a half months in	1	(The jury entered.)
2	jail. To this day the only panel that will ever have a chance	2	THE COURT: All right. Be seated, please.
3	to make that decision is you.	3	You have those instructions. Read them along with
4	And I understand that you have to listen to	4	me. Don't go to the end. I'm going to tell you what the law
5	everything and consider all of the evidence, not just from one	5	is, and you follow those instructions that I now give you.
6	side or the other, but all the evidence. But, ladies and	6	You will be able to take the instructions into the room where
7	gentlemen, what happened here, what happened to this family	7	you're deliberating, and you will be able to have all the
8	it was not ripe. This was not his gun. This was not his gun	8	documents and blowups that were introduced in evidence and so
9	and he wound up doing time for it. And if they had just been	9	much of the transcripts as you wish. They've ordered
10	honest about what happened, this never would have taken place	10	transcripts. So in some cases, we may actually send the
11	and he never would have done that time in jail. And I ask you	11	transcript in, should you ask for portions of it. But try to
12	please, when you are evaluating all the evidence, use your	12	be specific. We don't want to send in the whole trial, of
13	common sense, listen to the instructions that the Judge gives	13	course.
14	you, listen to the fact that they are the ones that have to	14	You're the judges of the facts. Neither the
15	prove that they have legitimate grounds to arrest this man.	15	attorneys nor I can help you very much more than we've already
16	And I will tell you, ladies and gentlemen, if you do	16	tried to assist you. I have no view myself as to how the case
17	that at long last, you will hold these officers accountable.	17	will have to be decided, and nothing I've said or done should
18	You are the final say. This is the last show. No one else	18	indicate to you that I have such a view.
19	will look at this. You are the ones that will make this	19	Your verdict have to be based on the evidence that
20	decision. And I ask you to do the right thing here. Give	20	you heard here and saw. Put aside any personal feelings you
21	this man justice. Do the right thing.	21	may have about the parties, race, religion, national origin,
22	THE COURT: Okay. Thank you. Why don't you take	22	ethnic background, gender, occupation, anything like that.
23	five minutes and we'll just read you the charge.	23	Don't do any research of your own and decide on what
24	(Jury is out of the courtroom at 1:53 p.m.)	24	you've heard and seen in the court.
25	(Continued on the next page.)	25	Everybody here is equal. That means that you
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1	shouldn't, when you come into court, have any view about how	1	the plaintiff's constitutional right to a fair trial by		
2	the case should be decided. Later on, after you consider the	2	presenting false evidence to state prosecutors in the case.		
3	evidence, of course you'll have a view. The police officers	3	So the first issue is whether the plaintiff was		
4	are equal here to the plaintiff because everybody in the	4	falsely arrested. The second issue is whether the plaintiff		
5	federal court is equal. Nobody's entitled to greater or less	5	was maliciously prosecuted. Third, whether the plaintiff was		
6	consideration.	6	denied the constitutional right to a fair trial. And only if		
7	Now, I'll say that somebody has the burden of proof	7	you find one or more of these questions or issues in favor of		
8	or something has to be proven by somebody as to particular	8	the plaintiff will you be required to consider the amount of		
9	issues. I mean that considering all of the evidence in the	9	damages.		
10	case, no matter who put it in, the party's claim on that issue	10	You understand that? Unless the defendant or one of		
11	must be established as more probably true than not true. If	11	them is liable, you don't have to go to damages. Is that		
12	the probabilities are equal, then the scales are equally	12	clear?		
13	balanced, and the party that has the burden has not met his	13	(Jury nodding.)		
14	burden of proof.	14	THE COURT: The plaintiff has the burden of proving		
15	Is that clear?	15	each element of the claims, except for the probable cause		
16	(Jury nodding.)	16	element of his false arrest claim. The burden is on a		
17	THE COURT: The first of the three claims the	17	defendant to prove that he had probable cause to arrest the		
18	plaintiff makes is that the arrest was illegal because of what	18	plaintiff.		
19	happened at the scene and that the statements made at various	19	Now, you have to decide the case unanimously. All		
20	times by the defendants were false, which the defendants deny	20	of you have to agree on the answer to the questions on the		
21	that. Second, the criminal charges were based upon	21	verdict sheet that I'll read to you in a moment.		
22	fabricated, that is, made-up evidence regarding the events	22	You'll have a list of the witnesses. You'll have a		
23	that occurred that night and the prosecution was maliciously	23	list of the documents, and those will be sent in to you. If		
24	brought against the plaintiff at the instigation, essentially,	24	you want the documents, either individually or all together,		
25	of the defendants. And that, third, the defendants violated	25	we'll send them in.		
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1 You'll send a note in. You'll communicate with me
2 through a note to the marshal from your foreperson.
3 There were objections made and rulings I made during
4 the course of the trial. Draw no inferences from them. If I
5 had something stricken, put it out of your mind. If a
6 question wasn't answered, don't rely on the question. It's
7 the question and answer both together that count.
8 Give the evidence the weight you think it deserves,
9 analyze it dispassionately, rationally and without prejudice
10 or emotion and draw whatever almost inferences you think
11 follow as a rational view of what happened here in your
12 attempt to decide what happened that night.
13 The opening and closings are not evidence.
14 Now, critically in this case is the question of
15 who's telling the truth. That is veracity. You can consider
16 each witness's demeanor, that is, what they appeared to be,
17 from their facial and other actions on the witness stand, the
18 way they testified, the opportunity they had to see and hear
19 and know about the events that night, the ability of the
20 witness to describe and recall and the reasonableness of the
21 testimony in light of all of the evidence in the case. You
22 can consider whether the testimony was contradicted by other
23 people's testimony or by what the witness said on an earlier
24 occasion.
25 If you find a witness has falsely testified as to

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1 anything, you may find other elements of what he said or she
2 said was true. But if you find that a person deliberately
3 lied to you, you can ignore all of that witness's testimony.
4 A witness may be mistaken without deliberately lying.
5 There was testimony about some of what was said
6 outside of court. You were indeed there to hear that
7 cross-examined immediately. But you consider the veracity of
8 what was said at that time outside of court in the same way as
9 you try to determine the veracity of a witness before you.
10 There were a few witnesses here with expert
11 backgrounds. If you believe they were experts, you may give
12 their opinions such weight as you think they deserve, applying
13 also all of the other elements of veracity considerations
14 because they are witnesses as well as people with special
15 backgrounds.
16 I made some findings. I'll indicate one of them, at
17 least, in the course of these discussions; and when I tell you
18 you must find something, then you will follow that
19 instruction.
20 The claims by the plaintiff are made under
21 Section 1983 of Title 42 of the United States Code, so-called
22 civil rights law, against the officers, Salim Randall and
23 Michael Burbridge. And essentially the law provides for a
24 claim in a civil court -- and this court is now sitting as a
25 civil court -- against individuals who have deprived people of

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1 their constitutional rights if they are state or local
2 officials acting under state color of law. The statute says
3 every person who under color of any statute, ordinance,
4 regulation, custom or usage of any state or territory of the
5 District of Columbia -- here it's the State of New York --
6 subjects or causes to be subject any citizen of the United
7 States -- that is here, the plaintiff -- or other person
8 within the jurisdiction to the deprivation of any rights,
9 privilege -- privileges or immunity secured by the
10 constitution or law shall be liable in damages to the injured
11 party.
12 Four things have to be made out to establish a claim
13 under that statute. First, that the defendant acted
14 intentionally or recklessly. Second, that the conduct
15 complained of was committed by a person acting under color of
16 state law. Third, that the conduct deprived the plaintiff of
17 a right, privilege or immunity secured by the constitution of
18 the United States or the laws. Here it's the constitution.
19 Fourth, that the defendant's acts were a proximate cause of
20 damages he sustained.
21 An act is intentional if it's done knowingly, that
22 is, if it's done voluntarily and deliberately and not because
23 of a mistake, accident, negligence or any other innocent
24 reason.
25 An act is reckless if it is done in conscious

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1 disregard of its known probable consequences.
2 The defendants, as New York State police officers,
3 were acting under color of state law when they arrested the
4 plaintiff. So this element is considered and should be
5 considered by you to have been satisfied or proven.
6 Now, then the deprivation of a constitutional right
7 has to be shown. The first claim of a deprivation is that the
8 plaintiff was falsely arrested. He claims that the defendants
9 falsely arrested him on May 15th, 2008 in violation of the
10 Fourth Amendment to the Constitution. A person is falsely
11 arrested when the defendant intended to confine the plaintiff,
12 and here that was shown by the handcuffing and taking the
13 plaintiff to the station house. Second, the plaintiff was
14 conscious of the confinement. And here obviously he was.
15 Third, that the plaintiff did not consent to the confinement.
16 And here, he did not. And fourth, the confinement was not
17 privileged. And that's the issue here, was the confinement
18 privileged for these two defendants on that night.
19 The initial stop was lawful. You can assume that.
20 That's not the violation that's claimed here. The evidence
21 relating to observation and acts surrounding the stop may be
22 considered in deciding credibility. So you can consider all
23 of the evidence from the time they first observed, according
24 to their evidence, the defendant up to the time when he was
25 placed under arrest.

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Now, you have to decide whether the arrest was privileged, that is to say whether there was probable cause for the arrest at the time he was taken into custody. The defendants contend that there was probable cause to arrest the plaintiff for the illegal possession of a firearm. There's no question that that was a firearm that was picked up. Nobody denies that. The plaintiff contends that there was no probable cause to arrest him for that crime. Because it would've been a crime for him to have possessed that firearm, that gun.

If there was an objectively reasonable ground for an officer's belief that a crime was being committed by the possession of that gun by the plaintiff, then the arrest was privileged. If one defendant, one police officer among the three had probable cause to arrest, then both these defendants are deemed to have had probable cause. An officer may rely on information supplied to him by another officer who made observations at the scene.

The existence of probable cause is measured at the moment of arrest. You may, however, consider as one piece of evidence, together with all of the evidence in the case, the fact that the charges against the plaintiff were later dismissed in determining whether the probable cause to arrest existed.

The failure of an officer to make a further inquiry

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before making an arrest when a reasonable person would have done so may but does not necessarily show a lack of probable cause. An officer is not required to conduct a full investigation prior to executing an arrest, but he may not ignore relevant evidence that he is aware of at the time or deliberately disregard facts that he is aware of at the time if the evidence or facts tends to rebut the existence of probable cause to arrest. And the defendant has the burden of showing that the burden cause to arrest existed in this case.

With regard to the substantive crime to which -- on which plaintiff's arrest was premised, a person is guilty of the criminal possession of a weapon when he possesses any firearm except under limited circumstances not relevant here. So if he possessed a firearm, he was guilty of that possession under the New York penal law.

Second, malicious prosecution is claimed by the plaintiff, and it's claimed that it occurred through the defendants providing false statements to and withholding relevant evidence that each was aware of from a state prosecuting attorney. The plaintiff was indicted on -- for the criminal possession of a weapon.

A defendant cannot be held liable for what he said to the grand jury. He may be held liable for what he said to the prosecutor if his statement was not in preparation for his grand jury testimony.

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A person is maliciously prosecuted when, first, criminal proceedings are initiated or continued against him by the defendant. Two, the proceedings are terminated in his favor. Three, there was no probable cause for the commencement of the proceeding. And four, the defendant's actions leading to the initiation of proceeding against the plaintiff were motivated by malice of a defendant.

There's no dispute that criminal proceedings were commenced and continued and that they ended in plaintiff's favor. The critical decision for you is whether there was probable cause for the initiation of the proceedings and whether a defendant's assistance in the initiation of the proceedings was motivated by malice.

Probable cause to prosecute exists when the facts and circumstances within the person's knowledge at the time he takes steps to proceed with the prosecution are sufficient for a person of reasonable prudence to believe that a violation of law was committed.

A grand jury's indictment creates a presumption that probable cause for prosecution existed. You may find the presumption rebutted, that is, overcome, and that no probable cause for prosecution existed based on all of the evidence.

The critical question here is whether either or both of the defendant officers believed that there was probable cause to initiate or assist in the prosecution of plaintiff.

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A defendant initiates or continues a prosecution maliciously if he initiates or continues it for a wrongful purpose, that is, if his goal is not to bring an alleged defendant to justice. For example, if he acts out of ill will or personal hostility towards a person accused or he acts out of a desire to punish a person without due process of law, then he can be said to have acted with malice.

You are permitted but not required to infer that malice existed if you find that a defendant lacked probable cause to initiate and continue with the charges against the plaintiff.

If probable cause existed for these officers to present the evidence they did to the state prosecuting attorney, then you must find for the defendants on this claim. If no probable cause existed but the defendant did not act with malice, then you must find for the defendants on this claim.

The third constitutional claim plaintiff makes is with a constitutional right to a fair trial. Every person has a right not to be prosecuted on the basis of information that is known by the government to be false. The government's doing so violates the constitution.

The question for you on this claim is whether the plaintiff has proven that the defendants, or either one of them, knowingly created false evidence and presented it to the

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1 prosecutor, leading to a deprivation of the plaintiff's
 2 liberty. If a defendant presented accurate evidence to the
 3 prosecutor or presented false evidence thinking it was true,
 4 then you must find for the defendant. And I've already told
 5 you a few moments ago that what was told to the prosecutor in
 6 the grand jury room or in preparation is not what we're
 7 talking about here. It's at other times.
 8 Do you understand that?
 9 (Jury nodding.)
 10 THE COURT: The third element that plaintiff must
 11 prove is that the acts of Officer Randall and officer
 12 Burbridge were a proximate cause of injuries he sustained.
 13 There can be more than one cause that's proximate.
 14 An injury or damage is proximately caused by an act
 15 or failure to act whenever the act or omission played a
 16 substantial part in bringing about or actually causing the
 17 injury or damage and that the injury was the direct or
 18 reasonably probable consequence of the act or omission.
 19 To recover damages, Marshall has the burden, that
 20 is, the plaintiff, of proving that he suffered an injury and
 21 that the injury would not have occurred without the wrongful
 22 conduct of a defendant.
 23 If you find the plaintiff has proven one of his
 24 three claims, you are going to have to determine damages, if
 25 any, that he sustained and proved. Don't infer that he had

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1 damages merely because I am instructing you. It's exclusively
 2 your function to determine liability and damages.
 3 He's seeking first compensatory damages. If
 4 liability is proven on one of the claims, you will award the
 5 plaintiff sufficient damages to compensate him for any injury
 6 proximately caused by one of the defendants' actions in
 7 creating the liability. Damages of this type is known as
 8 compensatory damages. Their purpose is to make the plaintiff
 9 whole, that is, to give back, to the extent that money can,
 10 the problem or injury that he -- for the injury that he
 11 suffered. Those damages should be fair and reasonable,
 12 neither inadequate nor excessive, and they should be only for
 13 injuries the plaintiff suffered or is reasonably likely to
 14 suffer as a proximate result of an injury claimed and proved.
 15 The plaintiff claims as the injury that he spent
 16 four and a half months in jail. He is not seeking recovery
 17 for any emotional or psychological injuries. He is not
 18 seeking recovery for loss of earnings. That is, for any
 19 emotional or psychological injuries that continued after the
 20 jail. He is seeking damages for the time he spent in jail.
 21 In awarding compensatory damages, be guided by
 22 dispassionate common sense. Use such definitiveness and
 23 accuracy as the circumstances permit.
 24 Each defendant is entitled to fair, separate and
 25 individual consideration both as to liability and as to

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1 damages. It's as if you were trying two separate trials at
 2 the same time.
 3 Is that clear to you?
 4 (Jury nodding.)
 5 THE COURT: If you find that only one is responsible
 6 for a particular injury, then you must impose damages, if any,
 7 for that injury only upon that defendant. If you find no
 8 injuries by any of the defendants, then you'll rule
 9 accordingly.
 10 The plaintiff is also asking for punitive damages.
 11 Should you award compensatory damages, you may award
 12 additional punitive damages if you find that a defendant
 13 engaged in extraordinary misconduct. You may do so to express
 14 your disapproval and to serve as an example or warning to
 15 others who might otherwise engage in similar conduct.
 16 If you find in favor of plaintiff and against the
 17 defendant and if you finds that the defendant acted so
 18 maliciously, wantonly or oppressively as to warrant an award
 19 of punitive damages, you may make such an award.
 20 To justify an award of punitive damages, a
 21 defendant's misconduct must be based upon a reckless or
 22 callous disregard of the rights of the plaintiff or a gross
 23 indifference treasure them. You may also award punitive
 24 damages if a defendant acted to punish the plaintiff out of
 25 ill will or spite.

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1 You may assess punitive damages or any damages
 2 against either or both of the defendants, or in the case of
 3 punitive damages, you may refuse to assess them at all.
 4 If punitive damages are assessed against more than
 5 one defendant, the amount may be the same or may be different.
 6 When you begin your deliberations, don't communicate
 7 with anybody outside the jury room except in writing through
 8 the marshal, who will give me the note, and then I'll
 9 communicate back or call you back into court.
 10 You can ask for help on the law or anything else.
 11 Be respectful to each other when you're having your
 12 discussions. Don't hesitate to change your mind after
 13 considering what other people say, but each of you is entitled
 14 to your individual vote and must exercise your individual
 15 judgment. And when the verdict comes in, you will each be
 16 asked if that is your verdict.
 17 Don't tell me how the vote stands until you come
 18 into court. If you've reached a verdict, don't report to me
 19 what it is. You will be asked that in open court. Inform the
 20 Court in writing when you've reached a verdict without
 21 indicating what that verdict is.
 22 You'll render your verdict without fear or without
 23 favor, without prejudice and without sympathy.
 24 Now, these are the questions you'll have to answer.
 25 First, did Randall falsely arrest the plaintiff?

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1 Yes or no.

2 Did Officer Burbridge falsely arrest the plaintiff?

3 Yes or no.

4 Did Officer Randall maliciously prosecute the

5 plaintiff? Yes or no.

6 Did Officer Burbridge maliciously prosecute the

7 plaintiff? Yes or no.

8 Did Officer Randall violate the plaintiff's

9 constitutional right to a fair trial by knowingly presenting

10 false evidence to the prosecutor? I'm sorry, in preparation

11 for the grand jury.

12 Did officer Burbridge violate plaintiff's

13 constitutional right to a fair trial by knowingly presenting

14 false evidence to the prosecutor under similar circumstances?

15 If your answers to all those questions is no, you

16 don't have to answer any of the following questions because

17 there won't be any damages to assess. If you find that a

18 defendant is or has violated a right, then you'll determine

19 compensatory damages first attributable to Officer Burbridge,

20 second, attributable to Officer Randall. Then, if you find

21 punitive damages, how much against Officer Burbridge --

22 Officer Randall, rather, and then against Officer Burbridge

23 Do any attorneys wish to see me at the side bar?

24 MR. NORINSBERG: No, your Honor.

25 MS. CASTRO: No, your Honor.

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1 MS. SANDS: Your Honor --

2 THE COURT: Do you wish to see me at the side bar?

3 MS. SANDS: I do.

4 THE COURT: Come to the side bar.

5 (At the bench.)

6 MS. SANDS: Your Honor, I think you misread the

7 question 3A.

8 THE COURT: You're turning to page?

9 MS. SANDS: Page 13, question 3A.

10 (In open court.)

11 THE COURT: 3A on Page 13 reads: Did Officer

12 Randall violate plaintiff's constitutional right to a fair

13 trial by knowingly presenting false evidence to the prosecutor

14 under the circumstances I described? Yes or no.

15 MS. SANDS: Okay.

16 THE COURT: No other objections are made.

17 Swear the marshal, please.

18 THE CLERK: Do you swear or affirm that you will

19 keep the jurors sworn in this cause together in some private

20 and convenient place, that you shall suffer no one to speak to

21 them nor shall you speak to them unless it be at the direction

22 of the court to ask if they have agreed upon a verdict?

23 THE MARSHAL: I do.

24 THE COURT: Thank you.

25 Continue your deliberations until I tell you to

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1 stop. Now, if you want to go beyond 4:30 p.m., send in a

2 note.

3 (The jury exited.)

4 THE COURT: The instructions I read from, which we

5 just distributed, is Court Exhibit 2, I think, of today's

6 date. The brief is marked 1, and this jury charge I gave is

7 marked Exhibit 2.

8 (Court Exhibit 1 was received in evidence, as of

9 this date.)

10 (Court Exhibit 2 was received in evidence, as of

11 this date.)

12 THE COURT: And we have prior drafts. There is a

13 April 24th draft, which is marked Exhibit 3.

14 (Court Exhibit 3 was received in evidence, as of

15 this date.)

16 THE COURT: There's an April 20th draft which is

17 marked 4.

18 (Court Exhibit 4 was received in evidence, as of

19 this date.)

20 THE COURT: And there's an April 17th draft, which

21 is marked 5.

22 (Court Exhibit 5 in evidence, was received as of

23 this date.)

24 THE COURT: Do you have a list of the witnesses,

25 please? Do you have a list of the exhibits, please? Make up

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1 the list, please. Gather all of the exhibits. Nothing is to

2 go in until I go through it.

3 MR. COHEN: You have all the exhibits that we put

4 in.

5 THE COURT: Make up your list and put it all

6 together.

7 I should say I appreciate the cooperation and fine

8 professional lawyering of both sides.

9 MS. GROSS: Thank you, your Honor.

10 MR. COHEN: Thank you, your Honor.

11 If I can make one request. Once the jury does have

12 a verdict, we would like to speak to them.

13 THE COURT: You're free to do so. It's up to them

14 whether they want to talk to you.

15 MR. COHEN: Can you just ask them if they want to

16 stick around, to let them know that the attorneys would like

17 to --

18 THE COURT: I will tell them. Yes, I will do that.

19 MS. GROSS: Defendants join in that request.

20 THE COURT: I will do that.

21 (Recess.)

22 THE COURT: Yes, what can I do to help you?

23 MS. CASTRO: We've gathered all of the exhibits and

24 created a witness list.

25 THE COURT: May I see the witness list, please.

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1 MS. CASTRO: Yes, your Honor.
 2 THE COURT: Is this satisfactory?
 3 MR. COHEN: I didn't look at the witness list, but
 4 I'm sure it's fine.
 5 THE COURT: Look at it.
 6 Mark that as Court Exhibit 6.
 7 (Court Exhibit 6 was received in evidence, as of
 8 this date.)
 9 THE COURT: Where is the list of exhibits?
 10 MR. COHEN: I reviewed that, that's fine.
 11 THE COURT: You have reviewed it?
 12 MR. COHEN: Yes.
 13 Your Honor, there's one little minor issue. I don't
 14 think it should be an issue. There are large blowups of the
 15 exhibits we did get admitted. Does it matter that -- they are
 16 all exhibits that were admitted.
 17 THE COURT: Send in all the blowups that the jury
 18 saw.
 19 Mark this list of exhibits as Exhibit 7.
 20 (Court Exhibit 7 was received in evidence, as of
 21 this date.)
 22 THE COURT: Plaintiff's Exhibit 1, Plaintiff's
 23 Exhibit 2, Plaintiff's Exhibit 3, Plaintiff's Exhibit 6,
 24 Plaintiff's Exhibit 11, Plaintiff's Exhibit 16, Plaintiff's
 25 Exhibit 17, Plaintiff's Exhibit 18.

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1 Defendant's Exhibit 8, where is it?
 2 MS. CASTRO: Our exhibits are lettered, your Honor.
 3 THE COURT: Defendant's Exhibit F1.
 4 MS. SANDS: It's a blowup.
 5 THE COURT: Defendant's Exhibit D1.
 6 MS. SANDS: Right here.
 7 THE COURT: Defendant's Exhibit C1.
 8 MS. SANDS: The gun.
 9 THE COURT: Defendant's Exhibit G, Defendant's
 10 Exhibit E.
 11 MS. SANDS: Your Honor, there were two smaller
 12 version E, and the blowup was E1.
 13 THE COURT: Okay. Let me have E, please, and E1.
 14 Are those all the exhibits now that you have?
 15 MS. SANDS: That's all the exhibits.
 16 THE COURT: Now let me see the plaintiff's blowups.
 17 MR. COHEN: This is, I believe -- this is the
 18 complete report. I don't know what number -- it says right
 19 there, complete report. It's Exhibit 16.
 20 THE COURT: 16, plus I'll mark it 16 blowup.
 21 What's the next one?
 22 MR. COHEN: The next one was the handwritten
 23 complaint report.
 24 THE COURT: Which is Exhibit?
 25 MR. COHEN: I believe it's --

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1 THE COURT: Exhibit 2?
 2 MR. COHEN: Yeah. And then there was the memo book
 3 which is Exhibit 1. Randall's memo book. Yeah. And then the
 4 last one is the criminal complaint, which is -- which is
 5 Exhibit 17.
 6 THE COURT: Plus the blowup.
 7 Ask the marshal to come in and take all of this.
 8 (Marshal enters.)
 9 THE COURT: Take these in there, please.
 10 (Marshal takes lists to the jury.)
 11 Mark this as a Court exhibit.
 12 They're asking for all of the exhibits.
 13 (Court Exhibit 8 was received in evidence, as of
 14 this date.)
 15 (Recess.)
 16 (Court Exhibit 9 was received in evidence, as of this date.)
 17 THE COURT: We have a note from the jury, Court
 18 Exhibit 9, "Can we give punitive award without giving
 19 compensatory?" The Court said it couldn't without objection
 20 from any party. However, research that we've just done
 21 indicates I was wrong. Second Circuit is clear on the point,
 22 Robinson v. Cattaraugus, C-A-T-T-A-R-A-U-G-U-S, County
 23 F.3d 153, Second Circuit, 1998.
 24 We note that the original instruction as well as the
 25 verdict formed erred, E-R-R-E-D, in indicating that

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1 compensatory damages were a prerequisite to punitive damages.
 2 We have long recognized, in Section 1983 cases, that punitive
 3 damages may be awarded even in the absence of compensatory
 4 awards. See E.G., King and Stolberg.
 5 Bring in the jury. I'm going to properly instruct
 6 them.
 7 MR. COHEN: Could we just address this point for one
 8 second before the jury comes in?
 9 THE COURT: Yes.
 10 MR. COHEN: Your Honor, there's a decision in
 11 Kerman v. City of New York which finds that when there is a
 12 finding of a constitutional right violation, compensatory
 13 damages are obligatory. They're mandatory if they find that
 14 our client was deprived of a constitutional right.
 15 THE COURT: I wanted to put in nominal. You agreed
 16 to take it out.
 17 MR. COHEN: I understand. The point is that
 18 deprivation of liberty is not -- actually, that case
 19 specifically deals with the fact when a right is found to be
 20 violated and there is time in jail, that there has to be
 21 compensation for that time. The loss of liberty claim, in and
 22 of itself, is more than just nominal if there's actually a
 23 finding of the right being violated. The case is Kerman,
 24 K-E-R-M-A-N.
 25 THE COURT: Where is it from?

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1 MR. COHEN: I believe it's the Second Circuit.		1 Honor. If I could just have one minute. Kerman is 374 F.3d	
2 MR. NORINSBERG: Second Circuit.		2 93. It's a Second Circuit decision from 2004. And if you	
3 MR. COHEN: I have the case cite in my bag.		3 look at Pages 123 to 125, the quote is -- well, what I've	
4 MR. NORINSBERG: It's definitely Second Circuit.		4 quoted for is "recognizing that loss of liberty and emotional	
5 MR. COHEN: I'm sure it was referenced in my motion		5 injuries are independent of each other and" --	
6 in limine papers, your Honor.		6 THE COURT: Start again.	
7 THE COURT: Why didn't you object to the charge?		7 MR. COHEN: -- "the tort of false arrest and	
8 MR. NORINSBERG: We did. That's why we opposed the		8 malicious prosecution are complete with even a brief restraint	
9 nominal damages. If there's a deprivation of liberty in any		9 of the Plaintiff's freedom, it is not necessary that any	
10 magnitude, Kerman says there has to be an award of some		10 damages result from it other than the confinement, itself."	
11 monetary compensation.		11 That's just for the portion that states that the	
12 THE COURT: You disagree?		12 loss of freedom is a compensatory damage. But I believe,	
13 MS. SANDS: We disagree, your Honor.		13 later on in the case, it talks about how there must be	
14 THE COURT: Have you got a case?		14 compensatory damages if a loss of liberty is found.	
15 MS. SANDS: We don't have a case handy, but we		15 THE COURT: Bring in the jury.	
16 certainly disagree that -- I know the case you just read, but		16 MS. SANDS: Your Honor, I believe that case focused	
17 we feel there has to be liability before they can --		17 on nominal damages, basically nominal damages if the jury	
18 THE COURT: Well, of course there has to be		18 found that there was a breach of constitutional rights.	
19 liability. That's not what we're talking about.		19 THE COURT: There has to be some damages.	
20 MR. NORINSBERG: Your Honor, the jury might		20 MS. SANDS: They couldn't be nominal. They would	
21 asking that question: If they don't find liability, can they		21 have to be --	
22 still award punitive damages?		22 THE COURT: But everybody agreed to strike the	
23 THE COURT: There has to be liability. What is the		23 nominal. I thought that the nominal was appropriate, but I'll	
24 citation?		24 bring in the jury and tell them they have to find some	
25 MR. COHEN: I'm looking for my motion papers, your		25 damages.	
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1 Bring in the jury.		1 question, "Can we give punitive awards without giving	
2 (The jury entered.)		2 compensatory," theoretically, you can. You can give punitive	
3 THE COURT: I want to correct what I think is in an		3 without compensatory if you found liability. Do you	
4 error in the charge. As suggested in your note, Court		4 understand?	
5 Exhibit 9, "Can we give punitive award without giving		5 (Jury nodding.)	
6 compensatory"?		6 THE COURT: But it's hard for me to see how if you	
7 First, if he was deprived of a constitutional		7 find liability and you find that he was deprived of his	
8 right -- that is, there is liability -- that's the first		8 liberty, you cannot give him some compensatory damages. I'm	
9 question. In order to give damages, there has to be		9 not telling you what to do, but it does seem to me that once	
10 liability. Do you all understand that?		10 you find liability which caused a deprivation of his	
11 (Jury nodding.)		11 liberty -- either for four and a half months or for a lesser	
12 THE COURT: Anybody have any question about that?		12 time while he was arrested, et cetera -- that's all	
13 If there's no liability, there's no damages. Do you		13 deprivation.	
14 understand that? Everybody understand that?		14 You've got to find some violation first, some	
15 (Jury nodding.)		15 liability. Then, after you find liability as -- if you do, as	
16 THE COURT: Assuming you find liability -- and I'm		16 I suggested, the next thing is compensatory damages. Now, if	
17 not saying you should or shouldn't, do you understand? If you		17 you do find liability, it's, again, hard for me to see how you	
18 find liability, and flowing from that liability as a proximate		18 cannot find some compensatory damages and he would be entitled	
19 cause was deprivation of the Plaintiff's liberty, either while he		19 to compensatory damages for a deprivation. Do you understand	
20 was arrested in violation of his rights -- if you find that --		20 that?	
21 or for another reason in violation of his rights, he was		21 (Jury nodding.)	
22 incarcerated for a substantial length of time, then he is		22 THE COURT: If the deprivation was caused by the	
23 entitled to compensatory damages. Do you understand that?		23 denial. Do you understand?	
24 (Jury nodding.)		24 (Jury nodding.)	
25 THE COURT: How much is for you to decide. So		25 THE COURT: Therefore, the question of whether we	
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1 can give punitive without giving compensatory is more a
 2 theoretical question than a real question because if you're
 3 going to give him compensatory under that hypothesis that you
 4 found liability and deprivation, you would then go to decide
 5 the punitive. So you wouldn't have a situation, can we give
 6 punitive -- a punitive award without giving compensatory.
 7 Does that answer your question?
 8 THE JUROR: Your Honor, may I speak?
 9 THE COURT: I'd rather you go back, consider the
 10 question you want to ask so that all the jurors agree on
 11 that's the way it should be phrased, if possible. And then,
 12 come in, send that in again. I don't want you to begin
 13 deliberations now because I want to consult with the attorneys
 14 and then call you in. But if you have a note, send it in. Do
 15 you all agree to that?
 16 (Jury nodding.)
 17 THE COURT: Any objection?
 18 MS. GROSS: No objection, your Honor.
 19 MS. SANDS: No objection.
 20 MR. COHEN: No objection.
 21 THE COURT: All right. Go in and see what you want
 22 to do about another question.
 23 (The jury exited.)
 24 THE COURT: My discussion was based on the case
 25 cited on punitive as well as on the Kerman case, K-E-R-M-A-N.

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1 It's 374 F.3d 93. And it's at 124, the beginning discussion.
 2 What is the Plaintiff's position with respect to
 3 what I just told the jury?
 4 MR. NORINSBERG: We have no objection. We feel it's
 5 a proper statement of the law based on what you just read to
 6 us in that case law.
 7 THE COURT: What's the Defendant's position?
 8 MS. SANDS: At this point, your Honor, Defendant's
 9 position is that the jury doesn't understand what the -- they
 10 don't understand the instruction. I don't know what their
 11 question is going to be subsequently. We have to see. But
 12 there's clearly an inconsistency here.
 13 THE COURT: Do you object to what I just told them?
 14 Do you want to consult with the other attorneys for a few
 15 minutes?
 16 MS. SANDS: Yeah, sure. Can we have a few minutes
 17 outside the courtroom?
 18 THE COURT: Yes. Try to be prompt because the jury
 19 is talking about the same problem.
 20 MS. SANDS: Yes.
 21 (Whereupon, a discussion was held off the record.)
 22 MS. GROSS: We're ready, your Honor.
 23 THE COURT: I'll hear from the Defendant.
 24 MS. GROSS: Your Honor, the defense does object to
 25 the instruction as given. As we understand these cases -- and

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1 we have not briefed them at any length, and we're just seeing
 2 Robinson now today -- my understanding of the case law is that
 3 punitive damages are awardable in the absence of compensatory
 4 damages so long as there has been a nominal damage award.
 5 In Robinson, there was a two-dollar nominal damage
 6 award, no compensatory given, punitive damages were given, and
 7 the court affirmed it. Robinson predates Kerman. Kerman now
 8 says no nominal damages where there's been a deprivation of
 9 liberty. So you have to give a compensatory damage award if
 10 there has been a deprivation. So the cases don't fit directly
 11 together. So I think that to cite Robinson for the
 12 proposition that one can award punitive damages in the absence
 13 of compensatory damages is a misstatement of the law. There
 14 has to have been an anchoring or nominal damage award to award
 15 punitive damages in the absence of compensatory damages.
 16 THE COURT: Well, my original approach to the case
 17 without objection from any of the parties -- and I don't
 18 criticize your work, of course, because it's been excellent --
 19 was that without some damage award, whether it's called
 20 "nominal" or "compensatory," I couldn't see punitive because
 21 it just seemed contrary to basic jurisprudence, American
 22 jurisprudence. The Supreme Court has been wrestling with this
 23 punitive matter as a constitutional issue.
 24 We have a note from the jury, punitive damages
 25 follow-up. "Your Honor, we had reviewed the Packet 1 and

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1 additional time, and had found the wording in Section 4, Part
 2 B to be confusing. We wanted to ask first before making our
 3 ruling. You have since clarified the confusion."
 4 I don't know whether they mean I've made it more
 5 confusing, or less. In any event, that's what we have. So
 6 apparently, they're satisfied with the instructions. How
 7 would you like me to modify it for the Defendant?
 8 MS. GROSS: We object to the instruction as it now
 9 stands. We believe that there was a misstatement of the
 10 law --
 11 THE COURT: What would you like me to tell the jury
 12 in answer to their two notes, Court Exhibit 9 and 10?
 13 (Court Exhibit 10 was received into evidence, as of
 14 this date.)
 15 MS. GROSS: Well, I think we're in uncharted waters
 16 here, your Honor.
 17 THE COURT: We may be uncharted, but I must --
 18 MS. GROSS: Yes, I agree.
 19 THE COURT: -- make a decision based upon your
 20 recommendations and my research. What shall I tell the jury?
 21 MS. GROSS: We would submit that the instruction as
 22 it originally stood, that punitive damages cannot be awarded
 23 in the absence of compensatory damages, was the correct
 24 statement of the law as a result of Robinson and Kerman read
 25 together. We're in uncharted waters with respect to the

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1 nominal damages in the 1983 cases. I think the original
 2 instruction as it stands is valid.
 3 THE COURT: Thank you. And the Plaintiff wants to
 4 have stand what I just told them?
 5 MR. COHEN: Yeah.
 6 THE COURT: Bring in the jury.
 7 Tomorrow, we can't start before 11. So if they want
 8 to continue tomorrow, we'll start at 11. I will get to the
 9 courthouse between 10:30 and 11. I have an important medical
 10 appointment. I'm not sure exactly when the doctor will let me
 11 go. So I won't be here possibly between 11 and 11:30, but I
 12 can answer notes over the phone or otherwise. Any objection
 13 to that?
 14 MS. GROSS: No, your Honor.
 15 MR. NORINSBERG: No objection.
 16 (The jury entered.)
 17 THE COURT: Well, you're an excellent jury. And
 18 what I now say should not be taken as criticizing you or
 19 denigrating what you do at all because you've done just the
 20 right thing. But you end by saying you have since clarified
 21 the confusion. Does that mean that you're no longer confused
 22 or that I've made it even more confusing?
 23 THE JUROR: All I was saying was that portion of the
 24 testimony --
 25 THE COURT: Have I removed the confusion?

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1 (Jury affirms.)
 2 THE COURT: Now, the second thing is, we can't start
 3 tomorrow until 11. Do you want to continue tonight, or do you
 4 want to come back at 11 tomorrow? Send in a note. Discuss it
 5 among yourselves, and send in a note. I'll either let you go
 6 home, or keep you a little longer if you're about to reach a
 7 verdict, or you'll come in at 11 tomorrow.
 8 (The jury exited.)
 9 THE COURT: Stand by.
 10 (Court Exhibit 10 was received in evidence, as of
 11 this date.)
 12 (Recess.)
 13 (Continued on the next page.)

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1 (Honorable Jack B. Weinstein takes the bench.)
 2 THE COURT: Sit down, please.
 3 (The jury is in the courtroom at 4:40 p.m.)
 4 THE COURT: Be seated, please. Now, be here at
 5 11:00 tomorrow.
 6 I don't want you to discuss this case with anyone,
 7 is that clear? I don't want you to do any research. Don't
 8 read the news tonight or tomorrow morning, okay, and keep an
 9 open mind. Until all of you are in the jury room, there will
 10 be no deliberations.
 11 Good night and have a pleasant evening.
 12 JUROR: Quick question. We leave all our stuff in
 13 there, the paperwork?
 14 THE COURT: You can leave the paperwork, yes.
 15 (Jury is out of the courtroom at 4: 41 p.m.)
 16 (Proceedings adjourned until tomorrow, 4/26/12 at
 17 11:00 a.m.)
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A1245

DEFENDANTS' BRIEF, DATED APRIL 25, 2012,
READ IN SUPPORT OF MULTIPLE TRIAL MOTIONS
(pp. A1245-A1256)

REPRODUCED FOLLOWING

A1246

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

JOSHUA MARSHALL,

Plaintiff,

-against-

P.O. SALIM RANDALL, Shield No. 15331,
Individually and in His Official Capacity, P.O.
MICHAEL BURBRIDGE, Shield No. 15488,
Individually and in His Official Capacity,

10 Civ. 2714 (JBW)(VVP)

Defendants.

-----x

DEFENDANTS' BRIEF IN SUPPORT
OF MULTIPLE TRIAL MOTIONS

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PRELIMINARY STATEMENT

Trial commenced in this matter on April 23, 2012 before the Honorable Jack B. Weinstein, United States District Judge. Defendants have made several motions during the course of trial, which the Court has either denied or reserved ruling on pending briefing by defendants.

Defendants respectfully submit this memorandum of law in support of their several motions seeking the following relief: (1) defendants should be permitted to cross-examine plaintiff as to his criminal history now that plaintiff has opened the door to such testimony; (2) plaintiff has improperly made an issue of the legal validity of the officers' initial approach in contravention of the court's prior order; defendants request a curative instruction, and, in the alternative, a mistrial; (3) defendants should be permitted to cross-examine plaintiff as to his emotional and psychological injuries stemming from his incarceration; (4) defendants should be permitted to mention in closing that the criminal case against plaintiff was dismissed on speedy trial grounds; (5) defendants request a curative instruction as to the import of the grand jury's indictment; (6) defendants request a jury instruction that the grand jury indictment creates a presumption of probable cause; and (7) defendants move to dismiss the malicious prosecution and fair trial claims in light of the U.S. Supreme Court's recent decision in *Rehberg*.

POINT I

PLAINTIFF HAS OPENED THE DOOR TO HIS CRIMINAL HISTORY; DEFENDANTS SHOULD BE PERMITTED TO CROSS-EXAMINE HIM AS TO THAT HISTORY.

Defendants previously moved *in limine* to be permitted to cross examine plaintiff as to his extensive criminal history, which includes two prior felony convictions. Those felonies are

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admissible under Fed. R. Evid. 609. The Court denied defendants' motion on the ground that such testimony was too prejudicial.¹

During his direct examination on April 24, 2012, plaintiff opened the door to cross examination regarding his criminal history. He gave testimony which falsely implied he had never been incarcerated before – testimony which is patently false.

His testimony was as follows:

Q: How did that make you feel, Mr. Marshall?

A: What, speaking in front of a grand jury?

Q: Yeah.

A: Well, I've never been in a position like that before, so

I was very nervous. Never been bombarded with questions, so I didn't really know how to handle the situation. *I was thrown off by the whole arrest situation, me being incarcerated.* So it was just so much coming at me at one time. But I still gave it a shot, man. You know, I was looking for a good outcome.

Ex. A, Trial Transcript, Marshall Testimony at 24, ll. 22-25; at 25, ll. 1-6 (emphasis added).

That testimony was false, misleading, and prejudicial to the defendants. Moreover, by falsely testifying to the effect that he had not been incarcerated before, he opened the door to examination regarding his prior felony convictions and incarcerations.

Moreover, if the does not allow any of his prior convictions or the fact that he was previously incarcerated to come in and the jury awards damages, they will have no basis to

¹ Defendants again move that the court reconsider its ruling prohibiting defendants from cross-examining plaintiff as to his criminal history. It is well-established law that such history is admissible and relevant, as it goes to credibility. See Williams v. McCarthy, 05 Civ. 10230 (SAS), 2007 U.S. Dist. LEXIS 79151, *4-5 (S.D.N.Y. Oct. 25, 2007) (prior felony convictions were admissible to impeach plaintiff's credibility in part because where "the versions of the events by the parties are radically different, witness credibility will be especially important in this case.") Moreover, it goes to damages. See Banushi v. Palmer, 08-CV-2937(KAM)(JO), 2011 U.S. Dist. LEXIS 419, *7-9 (E.D.N.Y. Jan. 4, 2011) (admitting evidence of plaintiff's prior arrests in trial involving false arrest claim to mitigate plaintiff's claim of damages and noting, "a plaintiff who has had a number of prior arrests and detentions is likely to have suffered less distress than one who has never before been detained ..."). During trial, plaintiff Marshall testified on direct as to his emotional injury from being incarcerated. Accordingly, the number of his prior incarcerations is both admissible and highly relevant.

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determine damages; it would be based on pure speculation. At the very least, they will have the false impression that he has never spent time in jail.

POINT II

PLAINTIFF HAS IMPROPERLY RAISED THE ISSUE OF DEFENDANTS' INITIAL DECISION TO APPROACH PLAINTIFF; BY SO DOING, HE HAS OPENED THE DOOR TO BURBRIDGE'S TESTIMONY REGARDING HIS RECOGNITION OF PLAINTIFF; AT THE VERY LEAST, DEFENDANTS REQUEST A CURATIVE INSTRUCTION; DEFENDANTS REQUEST A MISTRIAL IF THE COURT DECLINES TO GIVE THE JURY A CURATIVE INSTRUCTION AS WELL AS A RULING THAT PLAINTIFF IS PRECLUDED FROM IMPUGNING THE LEGAL VALIDITY OF THE INITIAL APPROACH IN CLOSING.

Defendants previously moved *in limine* to be permitted to elicit testimony from Officer Burbridge that one factor in his decision to approach plaintiff on May 15, 2008 was that he recognized plaintiff from a police database. The Court denied that motion for two reasons: (1) it noted that the "initial stop" (or initial approach) was not at issue in this case; and (2) the admission of such testimony would constitute reversible error under the Second Circuit's recent decision in *United States v. Scott*, No. 10-3972-cr (2d Cir. Apr. 6, 2012).

First, the legal validity of the initial approach is simply not at issue in this case. The Court so ruled on April 16, 2012. Since the court's initial ruling, plaintiff's counsel has argued *repeatedly* that defendants acted improperly in their initial approach of plaintiff. (Trial Transcript Unavailable, 4/24). For example, Officer Burbridge was repeatedly questioned as to the reasons for his initial approach:

Q: Prior to the time that you decided to stop Mr. Marshall, had you observed suspicious movements?
A: Yes.

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Q: Referring to your deposition on Page 66, Line 23,
"QUESTION: Did you observe any furtive movements by Joshua
Marshall before you decided to stop him?
"ANSWER: No."

MS. CASTRO: Objection. I also note there's an
objection at the deposition to that question also.
THE COURT: Overruled.

BY MR. NORINSBERG

Q: Do you recall being asked that question and giving that
answer?
A: Yes.
Q: You remember that?
A: Yes.
Q: So according to your deposition testimony, you did not
observe any suspicious movements by Mr. Marshall before you
decided to stop him; true or not true?

MS. CASTRO: Objection.
THE COURT: Overruled.
MS. CASTRO: Your Honor, this pertains to your
Honor's in limine rulings.
THE COURT: The reference is to the night from the
time of first observation to the time of arrest; is that
correct?
MR. NORINSBERG: Yes.
MS. CASTRO: Your Honor, may we be heard at sidebar?
THE COURT: You may not.
MS. CASTRO: Your Honor, I just note my objection
that counsel's question --
THE COURT: Your objection is always noted. We have
a full-time reporter. Proceed with the questioning.

Ex. C, Trial Transcript, Testimony of Michael Burbridge, April 24, 2012 at 124, ll. 6-25; at 125,
ll. 1-14.

As a result of plaintiff's improperly making an issue of the initial approach,
defendants request that the Court give the jury the following curative instruction: "Ladies and
Gentlemen, there is no issue in this case as to whether the officers were permitted to approach
and question plaintiff as he walked down the street on May 15, 2008. The only issue you have to
decide is whether they had a lawful basis to arrest him for possession of a weapon."

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Next, defendants renew their request that Officer Burbridge be permitted to testify that one factor in his decision to approach plaintiff was the fact that he recognized plaintiff from a police database. By its ruling, the Court is preventing him from testifying truthfully. Moreover, plaintiff has opened the door to this line of testimony by repeatedly questioning Officer Burbridge as to the reasons for his initial approach. Finally, the Second Circuit's ruling in *Scott* is simply not analogous here. In the *Scott* case, the Second Circuit ruled in the context of a criminal case that testimony by an officer regarding recognition from a prior encounter was too prejudicial. That case is distinguishable on two grounds: (1) it was a criminal case where the liberty of defendant was at stake, and thus the probative/prejudicial balancing test is different; and (2) the initial approach and/or stop was, in fact, at issue in that case. It is not here. This is a civil action for monetary damages. Defendants submit that the Court is allowing plaintiff to use its *in limine* ruling as both a sword and a shield.

Finally, defendants should be precluded from impugning or otherwise questioning the legal validity of the initial approach during their closing. The Court ruled that it is not at issue in the case, and plaintiff's have completely failed to abide by that ruling.

POINT III

DEFENDANTS SHOULD BE PERMITTED TO CROSS EXAMINE PLAINTIFF AS TO HIS CLAIM OF EMOTIONAL DAMAGES STEMMING FROM HIS INCARCERATION.

During plaintiff's direct examination, he testified that his stay on Rikers Island was unpleasant, depressing, and that he encountered unsavory individuals, at least one of whom had tuberculosis. He testified as follows:

- Q: Can you just describe a little bit for the jury what the conditions were like when you were in jail.
- A: I mean, you're surrounded about everything. You know, you have people with tuberculosis. You got people who just

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don't shower.

Ex. A, Trial Transcript, Testimony of Joshua Marshall, April 24, 2012 at 27, ll. 9-18.

However, plaintiff has abandoned his claim for emotional damages in this case. Specifically, during his deposition, plaintiff gave the following testimony:

Q: Are you seeking to recover for any emotional or psychological injuries?

A: *No, no.*

Ex. B, Marshall Deposition at 173, ll. 9-11 (emphasis added).

Defendants attempted to cross-examine plaintiff regarding his abandonment of that claim, but the objection to such cross-examination was sustained. Defendants request that they be allowed to cross-examine plaintiff as to his abandonment of the emotional damages claim. Allowing plaintiff to testify as to emotional damages, while precluding defendants from cross-examining as to his abandonment of that claim is highly prejudicial. Moreover, plaintiff's testimony about the conditions on Rikers Island creates the impression that he has never been there before, which is clearly not the case given his numerous other arrests and incarcerations. Thus, it goes to his credibility.

POINT IV

**DEFENDANTS SHOULD BE PERMITTED TO
MENTION IN CLOSING THE FACT THAT
PLAINTIFF'S CASE WAS DISMISSED ON
SPEEDY TRIAL GROUNDS.**

Defendants should be permitted to mention in closing that plaintiff's criminal case was dismissed on speedy trial grounds. Defendants do not dispute that dismissal on speedy trial grounds is a "favorable determination" for purposes of a malicious prosecution claim. That is not at issue. However, defendants should be able to inform the jury of the reason for the dismissal – the simple fact that it was dismissed on speedy trial grounds. This is one of the facts of this case

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and the jury should be allowed to know the basis for the dismissal. Defendants do not intend to characterize a speedy trial dismissal as a “technicality.” They simply intend to inform the jury that the case was dismissed. It did not go to trial. It was not “thrown out” by a judge. The factual statement – that the case was dismissed on speedy trial grounds – is not prejudicial to the plaintiff. However, the bald statement that the case was “dismissed,” without more, is prejudicial to the defendants.

The case cited by plaintiff in support of his contention that the jury should not be so informed, *Cantalino v. Danner*, 754 N.E.2d 164, 168 (N.Y. 2001), simply does not speak to the issue. It merely holds that for purposes of malicious prosecution, a speedy trial dismissal is considered a “favorable determination.” This is not in dispute. Nor does the case preclude defendants from informing the jury of the factual reason for the dismissal of the case.

POINT V

DEFENDANTS REQUEST A CURATIVE INSTRUCTION REGARDING THE IMPORT OF THE GRAND JURY INDICTMENT.

During plaintiff’s cross-examination, the Court instructed the jury that “Just because the grand jury indicted does not mean that the plaintiff was guilty.” The obverse is also true. Defendants request an instruction that “Just because the case was dismissed does not mean that the plaintiff didn’t have the gun.” As it stands, the Court’s instruction is not even-handed. In its partial form, it is incorrect and highly prejudicial to the defendants.

POINT VI

DEFENDANTS REQUEST A JURY INSTRUCTION THAT THE GRAND JURY’S INDICTMENT CREATES A PRESUMPTION OF PROBABLE CAUSE.

Defendants renew their request for a jury instruction that the grand jury's indictment creates a presumption of probable cause. *See Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003) (indictment by a grand jury creates a presumption of probable cause). To overcome that presumption plaintiff must produce evidence "that the indictment was procured by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith." *Alvarado v. City of New York*, 2011 U.S. App. LEXIS 25110 (2d Cir. N.Y. Dec. 19, 2011).

The Court previously rejected defendants' request because the Court reasoned, plaintiff's theory of the case is that the indictment was procured by fraud. Defendants agree that is plaintiff's theory of the case. But that doesn't change the law as to presumptions. The presumption has two parts: a presumption, and criteria by which the presumption may be rebutted. Here, the Court has, in effect, skipped to the second step.

Defendants submit that the failure to give the requested instruction is reversible error. *See Rothstein v. Carriere*, 373 F.3d 275, 285 (2d Cir. 2004) ("[i]n sum, the district court's erroneous disregard of the presumption that probable cause supported the prosecution of [plaintiff] requires a reversal of the judgment in his favor.")

POINT VI

**DEFENDANTS MOVE TO DISMISS BOTH
THE MALICIOUS PROSECUTION CLAIM
AND THE FAIR TRIAL CLAIM IN LIGHT OF
THE U.S. SUPREME COURT'S DECISION IN
REHBERG.**

Defendants move to dismiss plaintiff's malicious prosecution and fair trial claims in light of the Supreme Court's recent decision in *Rehberg v. Paulk*, 2012 U.S. LEXIS 2711 (Apr. 2, 2012), barring any §1983 action wherein plaintiff's civil rights claims are premised on allegations stemming from grand jury testimony. In that case, the Supreme Court held that jury witnesses are entitled to absolute immunity from "any § 1983 claim based on the witness'

testimony.” *Rehberg v. Paulk*, 2012 U.S. LEXIS 2711 at *23-24 (emphasis added). The Supreme Court went on to underscore the importance of this holding cautioning that “this rule may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness’ testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution.” *Id.* at *24. The reasoning behind granting absolute immunity for grand jury witnesses is the same logic previously used to grant absolute immunity for trial witnesses. *Id.* at *20-21. The main concern is that the grand jury may be deprived of critical evidence and the truth-seeking function of the tribunal weakened, as a result of a witness’ fear of retaliatory litigation. *Id.* Additionally, the potential of civil liability is not necessary to prevent false testimony, as there are other sanctions in place, such as prosecution for perjury, which provides a sufficient deterrent. *Id.* at *21.

In addition to granting a witness absolute immunity for grand jury testimony, importantly, *Rehberg* also states that a law enforcement officer does not initiate a prosecution, a necessary factor of the malicious prosecution standard, by testifying before a grand jury. *Rehberg*, 2012 U.S. LEXIS 2711 at *27 - *28. The Supreme Court stated “[b]y testifying before a grand jury, a law enforcement officer does not perform the function of applying for an arrest warrant; nor does such an officer make the critical decision to initiate a prosecution ... such a witness, unlike a complaining witness at common law, does not make the decision to press criminal charges.” *Id.* at *27. Indeed, the Court recognized the inherent unfairness in allowing a testifying officer to be civilly liable for a malicious prosecution action, yet insulate a prosecutor who in fact initiates and actively prosecutes a matter. *Id.* at *28 (“it is almost always a prosecutor who is responsible for the decision to present a case to a grand jury ... [i]t would thus be anomalous to permit a police officer who testifies before a grand jury to be sued for maliciously procuring an unjust prosecution when it is the prosecutor, who is shielded by

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EXHIBIT A - ANNEXED TO THE DEFENDANTS' BRIEF, DATED APRIL 25, 2012

Excerpt of Trial Transcript, Dated April 23, 2012

(pp. A1257-A1262)

REPRODUCED FOLLOWING

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EXHIBIT A

A1259

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1

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

2 -----X
JOSHUA MARSHALL,
3 Plaintiff,

4 versus 10-CV-02714

5 THE CITY OF NEW YORK,
Defendant. United States Courthouse
6 Brooklyn, New York
-----X

7
8 April 23, 2012
9:30 A.M.

9 EXCERPT OF TRANSCRIPT OF TRIAL
TESTIMONY OF JOSHUA MARSHALL
10 Before: HON. JACK B. WEINSTEIN,
UNITED STATES DISTRICT JUDGE

11 A P P E A R A N C E S .

12 FOR THE PLAINTIFF:

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Attorneys for the Plaintiff
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17 BY: GERALD M. COHEN, ESQ.
JON NORINSBERG, ESQ.

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20 For the Defendants:

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23 BY: FELICIA GROSS, ESQ.
24 JOHANA CASTRO, ESQ.
FRANCES SANDS, ESQ.
25

A1260

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24

DIRECT - J. MARSHALL

1 would be a situation where I would be able to present my case
2 to -- among peers. And it was an opportunity, and I should go
3 for it.

4 Q Now, was your attorney present when you testified in the
5 grand jury?

6 A Yes.

7 Q And was your attorney allowed to ask you any questions
8 while this case was presented to the grand jury?

9 MS. GROSS: Objection.

10 THE COURT: Overruled.

11 THE WITNESS: No.

12 BY MR. COHEN

13 Q Who was the only person questioning you in the grand
14 jury?

15 A The district attorney.

16 Q Now, Mr. Marshall, had you ever testified in a grand jury
17 before this incident?

18 A No.

19 MS. GROSS: Objection, your Honor. Objection.

20 THE COURT: Overruled.

21 BY MR. COHEN

22 Q How did that make you feel, Mr. Marshall?

23 A What, speaking in front of a grand jury?

24 Q Yeah.

25 A Well, I've never been in a position like that before, so

A1261

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25

DIRECT - J. MARSHALL

1 I was very nervous. Never been bombarded with questions, so I
2 didn't really know how to handle the situation. I was thrown
3 off by the whole arrest situation, me being incarcerated. So
4 it was just so much coming at me at one time. But I still
5 gave it a shot, man. You know, I was looking for a good
6 outcome.

7 Q Did you get a good outcome?

8 A No.

9 Q What happened, Mr. Marshall?

10 A I was indicted.

11 Q What happened after you were indicted? Where did you go?

12 A Right back to Rikers Island.

13 Q At that point, what was your understanding of where your
14 criminal case was going?

15 A Trial.

16 Q Why did you know the case was going to trial?

17 A Because I was not giving a guilty plea.

18 Q Can you tell the members of the jury why you weren't
19 going to plead guilty in this case.

20 A Because I was going to plead my innocence to the end.

21 Q Now, without telling the jury, again, what was said, did
22 you have discussions with your attorney about the risks of
23 taking a case like this to trial?

24 A Yes.

25 Q What was your understanding of the risks of fighting a

A1262

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DIRECT - J. MARSHALL

27

1 Q Did there come a time when you were actually finally
2 released from jail with respect to these charges?

3 A Yes.

4 Q When were you released from jail?

5 A The end of September. I don't know the exact date.

6 Q So approximately how long were you in jail in connection
7 with these charges?

8 A Four and a half months.

9 Q Can you just describe a little bit for the jury what the
10 conditions were like when you were in jail.

11 A I mean, you're surrounded about everything. You know,
12 you have people with tuberculosis. You got people who just
13 don't shower. You know --

14 MS. GROSS: Objection, your Honor.

15 THE WITNESS: -- the eating situation is horrible.

16 THE COURT: I'll allow it briefly.

17 THE WITNESS: It was just depressing. It was very
18 depressing, very overwhelming. Yeah, very disturbing.

19 BY MR. COHEN

20 Q Now, after you were released from jail, were you still
21 required to come back to court with respect to these charges?

22 A Yes.

23 Q How many times did you have to come back to court?

24 A Approximately eight times.

25 Q How long was this case pending after you were released

A1263

EXHIBIT B - ANNEXED TO THE DEFENDANTS' BRIEF, DATED APRIL 25, 2012

Excerpt of Examination Before Trial Transcript
of Joshua Marshall, Dated April 26, 2011
(pp. A1263-A1266)

REPRODUCED FOLLOWING

A1264

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EXHIBIT B

A1265

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COPY

1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSHUA MARSHALL,

Plaintiff,

-against-

THE CITY OF NEW YORK, Et. Al,

Defendants.

EXAMINATION BEFORE TRIAL

Of the Plaintiff, JOSHUA MARSHALL, held
on Tuesday, April 26, 2011, commencing at
10:26 a.m., at Sing Sing Correctional
Facility, 354 Hunter Road, Ossining, New
York, before Amelia Moller, a Shorthand
Reporter and a Notary Public in and for
the State of New York.

A1266

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JOSHUA MARSHALL 10R3164

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1 Q. That was legal aide?

2 A. At that moment, yes.

3 Q. So basically the money for the bail and
4 the lost wages, correct?

5 A. Yes.

6 Q. Are you seeking to recover for any
7 physical injuries?

8 A. No.

9 Q. Are you seeking to recover for any
10 emotional or psychological injuries?

11 A. No, no.

12 Q. Are you seeking to recover for any damage
13 to your reputation that might have
14 resulted from this arrest?

15 A. No.

16 Q. So, it would be for the economic damage
17 and the loss of your liberty the fact
18 that you were incarcerated, correct?

19 A. Correct.

20 Q. Okay. Have you ever been incarcerated on
21 other occasions other than as a result of
22 this incident here and the second
23 incident that happened in May of 2009?

24 A. Have I ever been incarcerated before
25 other than these two incidents?

A1267

EXHIBIT C - ANNEXED TO THE DEFENDANTS' BRIEF, DATED APRIL 25, 2012

Excerpt of Trial Transcript, Dated April 24, 2012

(pp. A1267-A1273)

REPRODUCED FOLLOWING

A1268

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EXHIBIT C

A1269

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1

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----X
4 JOSHUA MARSHALL,
5 Plaintiff,

6 versus

10-CV-02714 (JBW)

7 THE CITY OF NEW YORK,
8 Defendant. United States Courthouse
9 Brooklyn, New York
10 -----X

11 April 23, 2012
12 9:30 A.M.

13 TRANSCRIPT OF TRIAL
14 Before: HON. JACK B. WEINSTEIN,
15 UNITED STATES DISTRICT JUDGE

16 APPEARANCES:

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FRANCES SANDS, ESQ.

A1270

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DIRECT - OFFICER BURBRIDGE

123

1 right?

2 A Yes, I did.

3 Q And then shortly after you saw Mr. Marshall, you made a
4 decision to stop these two; is that correct?

5 A Yes.

6 Q And would you agree, Officer Burbridge, that it was only
7 a matter of seconds from the time you first saw Mr. Marshall
8 until the time you stopped him?

9 A Yes.

10 Q Now, you're familiar about what's known as furtive
11 movements, right?

12 A That's correct.

13 Q Furtive movements would be something of a suspicious
14 movement, right?

15 A That's correct.

16 Q Furtive movements would be an evasive movement, right?

17 A That's correct.

18 Q Can you please tell the members of this jury, did you
19 observe any furtive movements by Mr. Marshall before you
20 decided to stop him?

21 MS. CASTRO: Objection. Your Honor, the stop is not
22 in question. Further, counsel is diving into questions that
23 are inappropriate.

24 THE COURT: You may continue. Overruled.

25 THE WITNESS: I'm sorry, could you restate that.

A1271

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DIRECT - OFFICER BURBRIDGE

124

1 BY MR. NORINSBERG

2 Q Prior to the time that you saw Mr. Marshall, did you
3 observe any furtive movements before you decided to stop him?

4 A Can you rephrase it.

5 MR. NORINSBERG: Strike it.

6 BY MR. NORINSBERG

7 Q Prior to the time that you decided to stop Mr. Marshall,
8 had you observed suspicious movements?

9 A Yes.

10 Q Referring to your deposition on Page 66, Line 23,

11 "QUESTION: Did you observe any furtive movements by Joshua
12 Marshall before you decided to stop him?

13 "ANSWER: No."

14 MS. CASTRO: Objection. I also note there's an
15 objection at the deposition to that question also.

16 THE COURT: Overruled.

17 BY MR. NORINSBERG

18 Q Do you recall being asked that question and giving that
19 answer?

20 A Yes.

21 Q You remember that?

22 A Yes.

23 Q So according to your deposition testimony, you did not
24 observe any suspicious movements by Mr. Marshall before you
25 decided to stop him; true or not true?

A1272

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125

DIRECT - OFFICER BURBRIDGE

1 MS. CASTRO: Objection.

2 THE COURT: Overruled.

3 MS. CASTRO: Your Honor, this pertains to your
4 Honor's in limine rulings.

5 THE COURT: The reference is to the night from the
6 time of first observation to the time of arrest; is that
7 correct?

8 MR. NORINSBERG: Yes.

9 MS. CASTRO: Your Honor, may we be heard at sidebar?

10 THE COURT: You may not.

11 MS. CASTRO: Your Honor, I just note my objection
12 that counsel's question --

13 THE COURT: Your objection is always noted. We have
14 a full-time reporter. Proceed with the questioning.

15 BY MR. NORINSBERG

16 Q Now, before you decided to stop Mr. Marshall, you hadn't
17 activated your sirens at that point, correct?

18 A That's correct.

19 Q You hadn't activated your flashing lights, correct?

20 A That's correct.

21 Q You hadn't yelled out, "Stop, police," or words to that
22 effect; is that right?

23 A That's correct.

24 Q You hadn't made any effort to stop these two individuals;
25 is that correct?

A1273

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DIRECT - OFFICER BURBRIDGE

126

1 A That's correct.

2 Q Did you see Mr. Marshall's eyes bulging as he was walking
3 down the street?

4 A I don't remember them bulging.

5 Q Did you see him suddenly stop in his tracks and look
6 scared when he saw your police car?

7 A Yes.

8 Q You saw that, right?

9 A Yes, I did.

10 Q Even though you said in your deposition you didn't
11 observe anything suspicious, right?

12 MS. CASTRO: Objection.

13 BY MR. NORINSBERG

14 Q Now, after you saw Mr. Marshall, the police vehicle made
15 a right onto Park Street, isn't that true?

16 A That's true.

17 Q So you were here just a few moments before when Officer
18 Randall was giving his testimony, correct?

19 A That's correct.

20 Q And you saw Officer Randall explain to the jury where
21 things were on that photograph, correct?

22 A That's correct.

23 Q And you saw Officer Randall say that the police vehicle
24 actually was coming from the other side of Broadway and made a
25 left onto Park Street, true?

A1274

DEFENDANTS' MOTION FOR A MISTRIAL/ MEMORANDUM OF LAW ,
DATED APRIL 26, 2012
(pp. A1274-A1285)

REPRODUCED FOLLOWING

A1275

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

JOSHUA MARSHALL,

Plaintiff,

-against-

P.O. SALIM RANDALL, and P.O. MICHAEL
BURBRIDGE,

10 Civ. 2714 (JBW)(VVP)

Defendants.

-----x

DEFENDANTS' MOTION FOR A MISTRIAL AND
MEMORANDUM OF LAW IN SUPPORT THEREOF

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A1276

Case 1:10-cv-02714-JBW VVP Document 71 Filed 09/26/12 Page 2 of 11 PageID #: 1070

PRELIMINARY STATEMENT

Trial commenced in this matter on April 23, 2012 before the Honorable Jack B. Weinstein, United States District Judge. After the close of evidence, the Court instructed the jury by reading a jury charge.

Defendants respectfully submit that the jury charge, and subsequent “clarification,” (supplemental charge) was erroneous in several respects, namely: (1) the Court misstated the law with respect to whether the jury may award punitive damages in the absence of compensatory damages; (2) the Court misstated the law with respect to plaintiff’s psychological or emotional damages; (3) plaintiff was improperly permitted to ask the jury to “send a message” not just to these defendants but to all putative malfeasors; and (4) because defendants were precluded from introducing evidence of plaintiff’s prior incarcerations, any damage award is speculative; (5) plaintiff improperly argued during closing that defendants made misleading statements to the grand jury, which is not a proper basis for liability under *Rehberg*; (6) the Court misread the jury charge with respect to defendants’ potential liability for testimony before the grand jury in contravention of *Rehberg*; and (7) defendants request the attached special interrogatories.

Now come the defendants respectfully submitting that the error in the various jury charges is so prejudicial as to render the jury unable to reach a fair verdict. Accordingly, defendants move for a mistrial.

POINT I

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT MAY AWARD PUNITIVE DAMAGES IN THE ABSENCE OF COMPENSATORY DAMAGES.

A1277

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During its charge conference, the Court properly instructed the jury that: "If you award compensatory damages, you may award additional punitive damages if you find that a defendant engaged in extraordinary misconduct." Jury Instructions, Section IV, Part B (April 24, 2012, 4:51 PM Version). After giving such instruction, the jury submitted a note containing the following question, in sum or in substance: "Can we award punitive damages without first awarding compensatory damages? Section IV.B." The Court correctly informed them the answer was no. However, after conducting further research, the Court assembled the jury and gave them the following supplemental jury charge:

THE COURT: Assuming you find liability -- and I'm not saying you should or shouldn't, do you understand? If you find liability, and flowing from that liability as a proximate cause was deprivation of the Plaintiff's liberty, either while he was arrested in violation of his rights -- if you find that -- or for another reason in violation of his rights, he was incarcerated for a substantial length of time, then he is entitled to compensatory damages. Do you understand that?

(Jury nodding.)

THE COURT: How much is for you to decide. So the question, "Can we give punitive awards without giving compensatory," theoretically, you can. *You can give punitive without compensatory if you found liability.* Do you understand?

(Jury nodding.)

Ex. B, Trial Transcript, April 25, 2012 at 139, ll. 16-25; at 140, ll. 1-4 (emphasis added).

The Court's supplemental instruction was a misstatement of the law.

Prior to 2004, it was black letter law that a jury could award punitive damages in the absence of compensatory damages *so long as* it first found liability and awarded nominal damages. *See, e.g., Robinson v. Cattaraugus County*, 147 F.3d 153, 161 (2d Cir. N.Y. 1998). In that case, the jury made the same inquiry, in sum or in substance, of the district court as it did

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here (*i.e.*, can punitive damages be awarded in the absence of compensatory damages?). The Second Circuit held that the district court properly gave the following instruction in response to the jury's question:

[t]he Supreme Court has expressed the law that there are circumstances where a jury can find that there has been violation of a person's constitutional right, but then under the circumstances they find that there is no compensatory damage, that is, there is no pain and suffering, there is no lost wages, there are no other elements of any compensatory damage. In that case the Supreme Court says that it is proper to make an award of nominal damage, usually in the amount of one dollar. *And if there is a finding of liability, if there is a finding that there should be an award of nominal damage, even if there are no additional compensatory damages found, then the jury may go to consider whether or not punitive damages should be awarded under the circumstances.*

Robinson, 147 F.3d at 161 (emphasis added).

However, in 2004, a bedrock principle – that jurors could award nominal damages in constitutional rights deprivation cases – was altered by the Second Circuit in its decision in *Kerman v. City of New York*, 374 F.3d 93, 124 (2d Cir. N.Y. 2004). In the *Kerman* case, the court held that “where [a] plaintiff was indisputably deprived of his liberty, and the conduct of the defendant responsible for the deprivation was found to be unlawful, we have held that the plaintiff is entitled to compensatory, not merely nominal, damages.” Because the jury awarded nominal damages, the Second Circuit reversed and remanded for a new trial. Under *Kerman*, nominal damages are no longer available for loss of liberty claims.

Robinson and *Kerman* address different issues, and are in tension with one another. *Kerman*'s effect on the question of whether punitive damages may be awarded in the absence of compensatory damages, if any, is unclear.

In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), the Supreme Court again addressed the interrelationship between compensatory and punitive damages. In that case, it held that punitive damages must have a proportionate ratio to compensatory damages in

order to comport with due process.¹ It further held that the \$145 million punitive damage award in that case did not satisfy due process, and reversed and remanded for a remittitur or new trial. In so holding, the Supreme Court reasoned as follows:

[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, supra, at 575. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. 517 U.S., at 576-577. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. *It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.* *Id.*, at 575.

State Farm, 538 U.S. at 419 (emphasis added).

As a result of *State Farm*, the landscape with respect to the relationship between compensatory and punitive damages has shifted. Nevertheless, defendants submit that, as articulated by the U.S. Supreme Court in *State Farm*, punitive damages are *not* recoverable in the absence of compensatory damages. *State Farm* effectively overruled *Robinson*.

Therefore, the Court erred when it gave a supplemental instruction to the jury to the effect that that punitive damages may, in fact, be awarded in the absence of compensatory damages. Moreover, given the language of the supplemental jury instruction, the jury is now

¹ The Court's reasoning was as follows: "Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, [footnote omitted] few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S., at 23-24. We cited that 4-to-1 ratio again in *Gore*. 517 U.S., at 581." *State Farm*, 538 U.S. at 425 (2003).

compelled to award both compensatory and punitive damages. Defendants do not believe a curative instruction is possible in light of the fact that the jury has already been given two charges on the issue. Accordingly, defendants have no choice but to request a mistrial.

POINT II

THE COURT MISSTATED THE LAW WITH RESPECT TO PLAINTIFF'S SEEKING MENTAL AND EMOTIONAL DAMAGES.

Prior to instructing the jury, the Court heard argument on defendants' objections to the charge. After such argument, the Court inserted the following instruction into the jury charge: "Plaintiff claims as the injury that he spent four and a half months in jail. *He is not seeking recovery for any emotional or psychological injuries.* He is not seeking recovery for loss of earnings." Jury Charge, April 25, 2012, Section IV (Damages), Part A (Compensatory Damages) at p. 11 (emphasis added).

However, during the charge, the Court added new language which fundamentally altered the import. The Court stated:

THE COURT:

The plaintiff claims as the injury that he spent four and a half months in jail. He is not seeking recovery for any emotional or psychological injuries. He is not seeking recovery for loss of earnings. *That is, for any emotional or psychological injuries that continued after the jail. He is seeking damages for the time he spent in jail.*

Ex. B, Trial Transcript, April 25, 2012 at 126, ll. 15-20 (emphasis added).

This is an incorrect statement of the case. He is not seeking to recover for emotional or psychological injuries at all. He is seeking damages for loss of liberty.

A1281

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POINT III

THE COURT PERMITTED PLAINTIFF TO ASK THE JURY TO "SEND A MESSAGE" NOT JUST TO THESE DEFENDANTS BUT TO ALL PUTATIVE MALFEASORS.

During plaintiff's closing argument, he stated as follows:

MR. NORINSBERG:

But there's one section, the last section on punitive damages, that I do want you to take very seriously. Punitive damages gives you an opportunity to speak your voice and actually be heard as a juror. *You can send a message to these two Defendants.*

MS. CASTRO: Objection.

MR. NORINSBERG: *You can send a message.*

THE COURT: You may continue your argument.

MR. NORINSBERG: *You can send a message through your verdict, not just to these two Defendants, but to any other police officer out there that thinks it's okay to get in front of a grand jury and lie. You can send a message to any other police officer out there that thinks it's okay.*

THE COURT: Strike that reference to before the grand jury.

MR. NORINSBERG: *You can send a message to any other police officer that thinks it's okay to tell a prosecutor something that's completely false, and say, you know what, you can't do that. You actually cannot do that in our system. You will be accountable. And that's what we're going to ask you to do at the end of the day is listen to all of the evidence, work through it carefully. But if you do that and you honor the pledges you made in your jury selection, you're going to get the right result, and that's to hold these two Defendants responsible for putting this man in jail for four and a half months. Thank you.*

THE COURT: Thank you.

Ex. B, Trial Transcript, April 25, 2012 at 92, ll. 22-25; at 93, ll. 1-23 (emphases added).

Defendants submit that this line of argument is inflammatory, highly prejudicial, and should have been excluded. *See, e.g., Morales v. City of New York*, 2000 U.S. Dist. LEXIS 18711 (S.D.N.Y. 2000) (allowing plaintiff's motion for remittitur or new trial where punitive damage award was excessive; concluding, *inter alia*, that "[t]he plaintiff's summation asked the

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jury to ‘send a message’ to the police by their verdict. While this plea was made in connection with the argument on punitive damages, the jury may not have appreciated that such an argument was only relevant to a determination of punitive damages.’).

POINT IV

**BECAUSE DEFENDANTS WERE PRECLUDED
FROM INTRODUCING EVIDENCE OF
PLAINTIFF’S PRIOR INCARCERATIONS, ANY
DAMAGE AWARD IS SPECULATIVE.**

Assuming the jury returns a damages award for loss of liberty, the defense was precluded from eliciting testimony concerning plaintiff’s prior criminal convictions and incarcerations so there is nothing in the record from which the jury can base a damage award. Any such award would be purely speculative.

Defendants have repeatedly moved that the court permit defendants to elicit testimony or cross-examining plaintiff as to his criminal history. It is well-established law that such history goes directly to damages. *See Banushi v. Palmer*, 08-CV-2937(KAM)(JO), 2011 U.S. Dist. LEXIS 419, *7-9 (E.D.N.Y. Jan. 4, 2011) (admitting evidence of plaintiff’s prior arrests in trial involving false arrest claim to mitigate plaintiff’s claim of damages and noting, “a plaintiff ‘who has had a number of prior arrests and detentions is likely to have suffered less distress than one who has never before been detained’”). During trial, plaintiff Marshall testified on direct as to his emotional injury from being incarcerated. Accordingly, the number of his prior incarcerations is both admissible and highly relevant to damages.

POINT V

**PLAINTIFF IMPROPERLY ARGUED
DURING CLOSING THAT DEFENDANTS
MADE MISLEADING STATEMENTS TO
THE GRAND JURY, WHICH IS NOT A**

A1283

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**PROPER BASIS FOR LIABILITY UNDER
REHBERG.**

Finally, in his closing, plaintiff's counsel improperly argued that the defendants misled the "grand jury." He argued:

MR. NORINSBERG:

Now, you'll see the sections on compensatory damages, I don't even want to touch that with you. I want this case -- I don't want to taint this about this case being a money case. This is about holding these officers accountable. Whatever value you put on it is fine. It's about showing that you were not fooled like these other people. *You weren't misled like the grand jury.* You see the light here. You understand what happened.

Ex. B, Trial Transcript, April 25, 2012 at 92, ll. 14-21 (emphasis added).

Plaintiff's counsel made additional references to defendants' having misled the grand jury several other times during his closing. *See, e.g.,* p. 74, line 8 ("What he told the *grand jury* was a lie."); p. 76, line 1 ("What he told that *grand jury* is a lie."); p. 79, line 17 and 20-21. When he appeared before the *grand jury*, one story. When he appeared in the civil lawsuit, another story. ** He testified under oath in front of that *grand jury* that what happened was he had this conversation with Marshall that he said, "Sir, can I talk to you for a minute?"; and p. 93, lines 10-11 ("You can send a message through your verdict, not just to these two Defendants, but to any other police officer out there that thinks it's okay to get in front of a *grand jury* and lie.") (emphases added).

His argument is misleading and confusing. It may give the jury reason to believe that misstatements to the grand jury is a basis for liability, which it is not under the U.S. Supreme Court's recent decision in *Rehberg v. Paulk*, 2012 U.S. LEXIS 2711, *23-24 (Apr. 2, 2012). *See*

A1284

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id. (holding that grand jury witnesses are entitled to absolute immunity from “any § 1983 claim based on the witness’ testimony”).

POINT VI

**THE COURT MISREAD THE JURY CHARGE
WITH RESPECT TO DEFENDANTS’
POTENTIAL LIABILITY FOR TESTIMONY
BEFORE THE GRAND JURY IN
CONTRAVENTION OF REHBERG.**

During the jury charge, the Court misread a crucial instruction. The Court stated:

THE COURT

Did Officer Randall violate the plaintiff’s
constitutional right to a fair trial by knowingly presenting
*false evidence to the prosecutor? I’m sorry, in preparation
for the grand jury.*

Ex. B, Trial Transcript, April 25, 2012 at 129, ll. 8-12 (emphasis added).

Even though the Court corrected the mistake, the confusion created on a crucial point is highly prejudicial.

POINT VII

**DEFENDANTS REQUEST THE ATTACHED
SPECIAL INTERROGATORIES.**

Finally, defendants request that the attached special interrogatories be given to the jury after it has reached its verdict. *See* Exhibit A.

CONCLUSION

For the foregoing reasons, defendants Police Officers Salim Randall and Michael Burbridge respectfully request that the Court grant their motions in their entirety and for such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 26, 2012

A1285

Case 1:10-cv-02714-JBW-VVP Document 71 Filed 04/26/12 Page 11 of 11 PageID #: 1079

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A1286

EXHIBIT A - ANNEXED TO DEFENDANTS' MOTION
FOR A MISTRIAL/MEMORANDUM OF LAW

Excerpt of Special Interrogatories
(pp. A1286-A1288)

REPRODUCED FOLLOWING

Case 1:10-cv-02714-JBW-VVP Document 71-1 Filed 04/26/12 Page 1 of 12 PageID #: 1080

EXHIBIT A

A1288

Case 1:10-cv-02714-JBW-VVP Document 71-1 Filed 04/26/12 Page 2 of 12 PageID #: 1081

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
JOSHUA MARSHALL,
Plaintiff,
-against-
POLICE OFFICER SALIM RANDALL and POLICE
OFFICER MICHAEL BURBRIDGE,
Defendants.
-----X

10 Civ. 2714 (JBW)(VVP)

Special Interrogatories

- 1) Was it reasonable for Officer Randall to believe that plaintiff had a gun.

Yes _____

No _____

- 2) Was it reasonable for Officer Burbridge to believe that plaintiff had a gun.

Yes _____

No _____

- 3) Did Officer Randall knowingly mislead the prosecutor to procure an indictment.

Yes _____

No _____

- 4) Did Officer Burbridge knowingly mislead the prosecutor to procure an indictment.

Yes _____

No _____

- 5) Did Officer Randall knowingly present false information to the prosecutor.

Yes _____

No _____

- 6) Did Officer Burbridge knowing present false information to the prosecutor.

Yes _____

No _____

A1289

EXHIBIT B - ANNEXED TO DEFENDANTS' MOTION
FOR A MISTRIAL/MEMORANDUM OF LAW
Excerpt of Trial Transcript Dated April 25, 2012
(pp. A1289-A1299)

REPRODUCED FOLLOWING

A1290

Case: 1:10-cv-02714-JBW-VVP Document 71-1 Filed 04/26/12 Page 3 of 12 PageID #: 1082

EXHIBIT B

A1291

Case 1:10-cv-02714-JBW-VVP Document 71-1 Filed 04/26/12 Page 4 of 12 PageID #: 1083

1	PROCEEDINGS 2
<p>UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK JOSHUA MARSHALL, Plaintiff, versus THE CITY OF NEW YORK, Defendant. United States Courthouse Brooklyn, New York</p>	<p>Court Reporter: Judi Johnson, RPR, CRR, CLR Official Court Reporter Telephone: (718) 613-2882 Facsimile: (718) 613-2480 E-mail: Judi_Johnson@nyed.uscourts.gov</p>
<p>10-CV-02714 (JBW)</p>	<p>Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.</p>
<p>April 25, 2012 9:30 A.M.</p>	
<p>***VOLUME II**</p>	
<p>CONTINUED TRANSCRIPT OF TRIAL. HON. JACK B. WEINSTEIN, UNITED STATES DISTRICT JUDGE.</p>	
<p>APPEARANCES:</p>	
<p>FOR THE PLAINTIFF:</p>	
<p>COHEN & FITCH, LLP Attorneys for the Plaintiff 370 Worth Building 233 Broadway - Suite 1800 New York, New York 10007</p>	
<p>BY: GERALD M. COHEN, ESQ. JON NORINSBERG, ESQ.</p>	
<p>For the Defendants:</p>	
<p>NEW YORK CITY LAW DEPARTMENT Attorney for the Defendant 100 Church Street New York, New York 10007</p>	
<p>BY: FELICIA GROSS, ESQ. JOHANA CASTRO, ESQ. FRANCIS SANDS, ESQ.</p>	
<p>JUDI JOHNSON, RPR, CRR, CLR - Official Court Reporter</p>	<p>JUDI JOHNSON, RPR, CRR, CLR - Official Court Reporter</p>

PROCEEDINGS 3	PROCEEDINGS 4
<p>(In open court.)</p>	<p>Defendants asked to be permitted to cross-examine</p>
<p>COURTROOM DEPUTY: All rise. The United States</p>	<p>the plaintiff as to his criminal history now that he has</p>
<p>District Court for the Eastern District of New York is now in</p>	<p>opened the door to such testimony. I don't think he's opened</p>
<p>session. The Honorable JACK B. WEINSTEIN is now presiding.</p>	<p>the door. That is denied.</p>
<p>(Honorable JACK B. WEINSTEIN takes the bench.)</p>	<p>Second, plaintiff has improperly made an issue of</p>
<p>COURTROOM DEPUTY: Calling civil trial proceedings</p>	<p>the legal validity of the officers' initial approach in</p>
<p>in Docket no. 10-CV-2714, Joshua Marshall against The City of</p>	<p>contravention of the Court's prior order. Defendants request</p>
<p>New York.</p>	<p>a curative instruction and, in the alternative, a mistrial.</p>
<p>THE COURT: Marshall v. Randall and Burbridge.</p>	<p>As I explained yesterday, there was no contravention of the</p>
<p>I have the defendants' brief in support of multiple</p>	<p>Court's prior order. The testimony was properly limited to</p>
<p>trial motions.</p>	<p>the period from which the defendants had first observed the</p>
<p>MR. COHEN: Your Honor, may I step outside just to</p>	<p>plaintiff to the time of arrest.</p>
<p>get my co-counsel?</p>	<p>Defendants asked for a mistrial, which is denied on</p>
<p>THE COURT: If he's here.</p>	<p>the merits.</p>
<p>MR. COHEN: He's here.</p>	<p>Third, defendants should be permitted to</p>
<p>MS. CASTRO: Your Honor, I will step out and get my</p>	<p>cross-examine plaintiff as to his emotional and psychological</p>
<p>co-counsel as well.</p>	<p>injuries. He's not seeking damages. And I'll modify the</p>
<p>(A brief pause.)</p>	<p>charge, as I'll explain in a moment, to make that clear.</p>
<p>THE COURT: I've gone over this brief in support of</p>	<p>Fourth, defendants should be permitted to mention in</p>
<p>the defendants' multiple trial motions. Thank you very much</p>	<p>closing that the criminal case was dismissed on Speedy Trial</p>
<p>for getting this in early. It was helpful to be able to read</p>	<p>rules. I've already dealt with that, and I see no reason to</p>
<p>it early this morning.</p>	<p>reopen that. It's been discussed repeatedly.</p>
<p>I'll briefly summarize the conclusions I have and</p>	<p>Defendants request a curative instruction as to the</p>
<p>changes I'm making, and then if it's necessary, we can have</p>	<p>import of the grand jury's indictment. That's five, and it's</p>
<p>further argument.</p>	<p>combined really with six. Instruction of a presumption of</p>
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A1292

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PROCEEDINGS		137	PROCEEDINGS		138
1	MR. COHEN: I believe it's the Second Circuit.		1	Honor. If I could just have one minute. Kerman is 374 F.3d	
2	MR. NORINSBERG: Second Circuit.		2	93. It's a Second Circuit decision from 2004. And if you	
3	MR. COHEN: I have the case cite in my bag.		3	look at Pages 123 to 125, the quote is -- well, what I've	
4	MR. NORINSBERG: It's definitely Second Circuit.	4	4	quoted for is "recognizing that loss of liberty and emotional	
5	MR. COHEN: I'm sure it was referenced in my motion		5	injuries are independent of each other and" --	
6	in limine papers, your Honor.		6	THE COURT: Start again.	
7	THE COURT: Why didn't you object to the charge?	7	7	MR. COHEN: -- "the tort of false arrest and	
8	MR. NORINSBERG: We did. That's why we opposed	8	8	malicious prosecution are complete with even a brief restraint	
9	nominal damages. If there's a deprivation of liberty in any	9	9	of the Plaintiff's freedom, it is not necessary that any	
10	magnitude, Kerman says there has to be an award of some	10	10	damages result from it other than the confinement, itself."	
11	monetary compensation.		11	That's just for the portion that states that the	
12	THE COURT: You disagree?	12	12	loss of freedom is a compensatory damage. But I believe,	
13	MS. SANDS: We disagree, your Honor.	13	13	later on in the case, it talks about how there must be	
14	THE COURT: Have you got a case?	14	14	compensatory damages if a loss of liberty is found.	
15	MS. SANDS: We don't have a case handy, but we	15	15	THE COURT: Bring in the jury.	
16	certainly disagree that -- I know the case you just read, but	16	16	MS. SANDS: Your Honor, I believe that case focused	
17	we feel there has to be liability before they can --	17	17	on nominal damages, basically nominal damages if the jury	
18	THE COURT: Well, of course there has to be	18	18	found that there was a breach of constitutional rights.	
19	liability. That's not what we're talking about.	19	19	THE COURT: There has to be some damages.	
20	MR. NORINSBERG: Your Honor, the jury might	20	20	MS. SANDS: They couldn't be nominal. They would	
21	ask that question: If they don't find liability, can they	21	21	have to be --	
22	still award punitive damages?	22	22	THE COURT: But everybody agreed to strike the	
23	THE COURT: There has to be liability. What is the	23	23	nominal. I thought that the nominal was appropriate, but I'll	
24	citation?	24	24	bring in the jury and tell them they have to find some	
25	MR. COHEN: I'm looking for my motion papers, your	25	25	damages.	

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PROCEEDINGS		139	PROCEEDINGS		140
1	Bring in the jury.		1	question, "Can we give punitive awards without giving	
2	(The jury entered.)		2	compensatory," theoretically, you can. You can give punitive	
3	THE COURT: I want to correct what I think is in a	3	3	without compensatory if you found liability. Do you	
4	error in the charge. As suggested in your note, Court	4	4	understand?	
5	Exhibit 9, "Can we give punitive award without giving	5	5	(Jury nodding.)	
6	compensatory?"	6	6	THE COURT: But it's hard for me to see how if you	
7	First, if he was deprived of a constitutional	7	7	find liability and you find that he was deprived of his	
8	right -- that is, there is liability -- that's the first	8	8	liberty, you cannot give him some compensatory damages. I'm	
9	question. In order to give damages, there has to be	9	9	not telling you what to do, but it does seem to me that once	
10	liability. Do you all understand that?	10	10	you find liability which caused a deprivation of his	
11	(Jury nodding.)	11	11	liberty -- either for four and a half months or for a lesser	
12	THE COURT: Anybody have any question about	12	12	time while he was arrested, et cetera -- that's all	
13	If there's no liability, there's no damages. Do you	13	13	deprivation.	
14	understand that? Everybody understand that?	14	14	You've got to find some violation first, some	
15	(Jury nodding.)	15	15	liability. Then, after you find liability as -- if you do, as	
16	THE COURT: Assuming you find liability -- and	16	16	I suggested, the next thing is compensatory damages. Now, if	
17	not saying you should or shouldn't, do you understand? If you	17	17	you do find liability, it's, again, hard for me to see how you	
18	find liability, and flowing from that liability as a proximate	18	18	cannot find some compensatory damages and he would be entitled	
19	cause was deprivation of the Plaintiff's liberty, either while he	19	19	to compensatory damages for a deprivation. Do you understand	
20	was arrested in violation of his rights -- if you find that --	20	20	that?	
21	or for another reason in violation of his rights, he was	21	21	(Jury nodding.)	
22	incarcerated for a substantial length of time, then he is	22	22	THE COURT: If the deprivation was caused by the	
23	entitled to compensatory damages. Do you understand that?	23	23	denial. Do you understand?	
24	(Jury nodding.)	24	24	(Jury nodding.)	
25	THE COURT: How much is for you to decide. So	25	25	THE COURT: Therefore, the question of whether we	

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A1293

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PROCEEDINGS	125	PROCEEDINGS	126
1	prosecutor, leading to a deprivation of the plaintiff's	1	damages merely because I am instructing you. It's exclusively
2	liberty. If a defendant presented accurate evidence to the	2	your function to determine liability and damages.
3	prosecutor or presented false evidence thinking it was true,	3	He's seeking first compensatory damages. If
4	then you must find for the defendant. And I've already told	4	liability is proven on one of the claims, you will award the
5	you a few moments ago that what was told to the prosecutor in	5	plaintiff sufficient damages to compensate him for any injury
6	the grand jury room or in preparation is not what we're	6	proximally caused by one of the defendants' actions in
7	talking about here. It's at other times.	7	creating the liability. Damages of this type is known as
8	Do you understand that?	8	compensatory damages. Their purpose is to make the plaintiff
9	(Jury nodding.)	9	whole, that is, to give back, to the extent that money can,
10	THE COURT: The third element that plaintiff must	10	the problem or injury that he -- for the injury that he
11	prove is that the acts of Officer Randall and officer	11	suffered. Those damages should be fair and reasonable,
12	Burbridge were a proximate cause of injuries he sustained.	12	neither inadequate nor excessive, and they should be only for
13	There can be more than one cause that's proximate.	13	injuries the plaintiff suffered or is reasonably likely to
14	An injury or damage is proximally caused by an act	14	suffer as a proximate result of an injury claimed and proved.
15	or failure to act whenever the act or omission played a	15	The plaintiff claims as the injury that he spent
16	substantial part in bringing about or actually causing the	16	four and a half months in jail. He is not seeking recovery
17	injury or damage and that the injury was the direct or	17	for any emotional or psychological injuries. He is not
18	reasonably probable consequence of the act or omission.	18	seeking recovery for loss of earnings. That is, for any
19	To recover damages, Marshall has the burden, that	19	emotional or psychological injuries that continued after the
20	is, the plaintiff, of proving that he suffered an injury and	20	jail. He is seeking damages for the time he spent in jail.
21	that the injury would not have occurred without the wrongful	21	In awarding compensatory damages, be guided by
22	conduct of a defendant.	22	dispassionate common sense. Use such definitiveness and
23	If you find the plaintiff has proven one of his	23	accuracy as the circumstances permit.
24	three claims, you are going to have to determine damages, if	24	Each defendant is entitled to fair, separate and
25	any, that he sustained and proved. Don't infer that he had	25	individual consideration both as to liability and as to

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PROCEEDINGS	127	PROCEEDINGS	128
1	damages. It's as if you were trying two separate trials at	1	You may assess punitive damages or any damages
2	the same time.	2	against either or both of the defendants, or in the case of
3	Is that clear to you?	3	punitive damages, you may refuse to assess them at all.
4	(Jury nodding.)	4	If punitive damages are assessed against more than
5	THE COURT: If you find that only one is responsible	5	one defendant, the amount may be the same or may be different.
6	for a particular injury, then you must impose damages, if any,	6	When you begin your deliberations, don't communicate
7	for that injury only upon that defendant. If you find no	7	with anybody outside the jury room except in writing through
8	injuries by any of the defendants, then you'll rule	8	the marshal, who will give me the note, and then I'll
9	accordingly.	9	communicate back or call you back into court.
10	The plaintiff is also asking for punitive damages.	10	You can ask for help on the law or anything else.
11	Should you award compensatory damages, you may award	11	Be respectful to each other when you're having your
12	additional punitive damages if you find that a defendant	12	discussions. Don't hesitate to change your mind after
13	engaged in extraordinary misconduct. You may do so to express	13	considering what other people say, but each of you is entitled
14	your disapproval and to serve as an example or warning to	14	to your individual vote and must exercise your individual
15	others who might otherwise engage in similar conduct.	15	judgment. And when the verdict comes in, you will each be
16	If you find in favor of plaintiff and against the	16	asked if that is your verdict.
17	defendant and if you find that the defendant acted so	17	Don't tell me how the vote stands until you come
18	maliciously, wantonly or oppressively as to warrant an award	18	into court. If you've reached a verdict, don't report to me
19	of punitive damages, you may make such an award.	19	what it is. You will be asked that in open court. Inform the
20	To justify an award of punitive damages, a	20	Court in writing when you've reached a verdict without
21	defendant's misconduct must be based upon a reckless or	21	indicating what that verdict is.
22	callous disregard of the rights of the plaintiff or a gross	22	You'll render your verdict without fear or without
23	indifference toward them. You may also award punitive	23	favor, without prejudice and without sympathy.
24	damages if a defendant acted to punish the plaintiff out of	24	Now, these are the questions you'll have to answer.
25	ill will or spite.	25	First, did Randall falsely arrest the plaintiff?

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A1294

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PROCEEDINGS	89	PROCEEDINGS	90
1 years? No one ever talked to him. This man was so		1 it from the lawyer. My point is this: How real is that	
2 unimportant that the D.A.'s office never interviewed him, let		2 testimony? It's four years after the fact meeting with their	
3 alone him testifying in front of a grand jury. And this guy,		3 lawyers. And at the end of the day, it really doesn't change	
4 he comes in here. What's the one thing, the one undisputed		4 any of the dynamics in this case at all.	
5 fact we get out of him? He didn't see who threw the gun. He		5 The one part, I don't know if you believe it, I	
6 did not see who threw the gun. That's the number one fact,		6 don't think this guy actually saw anything. Even if you	
7 and with good reason.		7 believed his story they saw Meade's hands, that just would	
8 The man's driving the wrong way down a one-way		8 make perfect sense to this whole story of what happened.	
9 street at night in an area where you have several stores that		9 Meade is going along. He's the one that tosses the gun. He's	
10 are open 24 hours, and of course he's paying attention to		10 the one worried about the cops. Officers, look, I got nothing	
11 what's ahead of him. He's not looking. What did he actually		11 here. What normal person would walk down the street, and when	
12 remember? This man said he did thousands of arrests, over a		12 police are coming, would go like this? That doesn't make	
13 thousand in his career. And yet, four years later, he's		13 sense. He's doing it because he's got the guilty conscience.	
14 contacted for the first time. And wouldn't you know it, he		14 He knows he just tossed that gun. He wants to make sure the	
15 just remembers in great detail this particular case. Of		15 officers think it's not him. And guess what? It worked. It	
16 course, it comes out that his memory was somewhat refreshed		16 worked.	
17 when he was able to meet with the lawyers from the Defendant		17 The bottom line is this, ladies and gentlemen. Your	
18 in this case.		18 questions are going to come down to what they call a verdict	
19 And we're seeing what happens here. We saw an		19 sheet. I'm just going to walk through this very briefly with	
20 example with Officer Burbridge. Remember, I questioned him		20 you. You'll get it again. You're going to have copies of it.	
21 yesterday about this. During his deposition, Officer		21 You'll have a chance to go through this extensively.	
22 Burbridge couldn't think of the right answer. We had a break		22 Essentially, there are three main questions: Was Mr. Marshall	
23 and all of a sudden, the answers came flowing. We saw how		23 falsely arrested by these two Defendants; was he maliciously	
24 Officer Randall was only too happy to adopt the term, his		24 prosecuted; was he denied a right to a fair trial by the false	
25 "associate." He started using that in his direct after hearing		25 evidence?	

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PROCEEDINGS	91	PROCEEDINGS	92
1 Now, I suggest to you all of those questions turn on		1 THE COURT: You may continue your argument.	
2 the very first thing that we talked about when I started my		2 MR. NORINSBERG: -- defense counsel got up in your	
3 closing argument today: Did Marshall have a gun on him? If		3 opening and said this is just an open-and-shut case. We	
4 Marshall did not have gun on him, if the answer to that		4 actually want you to think about it. When you think about it,	
5 question is no, he did not have a gun, then the answer to all		5 let's say some of you still are not sure. You don't know	
6 of the questions on the verdict sheet is yes. Now, if		6 where you are. The first questions, the first two questions	
7 Marshall actually had the gun, if you still believe that after		7 on false arrest, the Defendants actually have the burden of	
8 everything you've heard, then of course, he's not entitled to		8 proof on those questions. You'll hear that from the judge.	
9 anything. You throw him out. That's your job as jurors.		9 They have the burden to prove that they had grounds to arrest	
10 But if you actually think through this and believe		10 Marshall, not us. We have the burden on the other two claims.	
11 that these officers gave false information to the prosecutors,		11 But on those first two questions, for some of you, if you're	
12 they duped the prosecutors because the prosecutors weren't		12 not comfortable with that, they have the burden. If they fail	
13 on the street. They duped it and put it over on the grand		13 to meet their burden, they lose on that claim.	
14 jury with these false stories. If you believe that's what		14 Now, you'll see the sections on compensatory	
15 happened, then the Marshall to not having a gun, the answer		15 damages, I don't even want to touch that with you. I want	
16 all the answers on the verdict sheet is yes. It's yes.		16 this case -- I don't want to taint this about this case being	
17 And then, you'll see there's a question. When		17 a money case. This is about holding these officers	
18 they're talking about maliciously prosecuting, just so you		18 accountable. Whatever value you put on it is fine. It's	
19 understand, our view is simply this: They're feeding false		19 about showing that you were not fooled like these other	
20 information. They may not be the prosecutors, per se, but		20 people. You weren't misled like the grand jury. You see the	
21 they're feeding that information. Now, one thing on the first		21 light here. You understand what happened.	
22 two questions on false arrest. Let's say some of you -- and I		22 But there's one section, the last section on	
23 know there's room for a healthy discussion about all this case		23 punitive damages, that I do want you to take very seriously.	
24 and the facts. It's not like the attorneys --		24 Punitive damages gives you an opportunity to speak your voice	
25 MS. CASTRO: Objection.		25 and actually be heard as a juror. You can send a message to	

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PROCEEDINGS	93	PROCEEDINGS	94
1 these two Defendants.		1 a quarter after one. Don't discuss the case.	
2 MS. CASTRO: Objection.		2 (The jury exited.)	
3 MR. NORINSBERG: You can send a message.		3 THE COURT: You have the jury charge with all the	
4 THE COURT: You may continue your argument.		4 corrections. And we've run off copies for the jury later.	
5 MR. NORINSBERG: You can send a message through		5 Enjoy your lunch. I'll see you at 1:15.	
6 verdict, not just to these two Defendants, but to any other		6 (A lunch recess was taken.)	
7 police officer out there that thinks it's okay to get in front		7 (Continued on the next page.)	
8 of a grand jury and lie. You can send a message to any		8	
9 other police officer out there that thinks it's okay.		9	
10 THE COURT: Strike that reference to before the		10	
11 grand jury.		11	
12 MR. NORINSBERG: You can send a message to any other		12	
13 police officer that thinks it's okay to tell a prosecutor		13	
14 something that's completely false, and say, you know what, you		14	
15 can't do that. You actually cannot do that in our system.		15	
16 You will be accountable. And that's what we're going to ask		16	
17 you to do at the end of the day is listen to all of the		17	
18 evidence, work through it carefully. But if you do that and		18	
19 you honor the pledges you made in your jury selection, you're		19	
20 going to get the right result, and that's to hold these two		20	
21 Defendants responsible for putting this man in jail for four		21	
22 and a half months. Thank you.		22	
23 THE COURT: Thank you. Lunch will be up at 12:30.		23	
24 Do you want to take a break now, and then get back here at		24	
25 about quarter after one, take a break now? We'll continue at		25	

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PROCEEDINGS	95		96
1		1	is a long time to remember every single detail of what
2 (Honorable Jack B. Weinstein takes the bench.)		2	occurred. However, the evidence has shown that Officer
3 (Jury is in the courtroom at 1:20 p.m.)		3	Randall is consistent in the important facts of this case. He
4 THE COURT: Be seated, please. Proceed.		4	knows what he saw and he knows what he heard. He knows that
5 CLOSING STATEMENT BY THE DEFENSE		5	he saw the plaintiff pull an object out of his waistband, make
6 MS. CASTRO: Good afternoon, ladies and gentlemen.		6	a pitching motion, and he tossed it. He knows that he heard
7 JURORS: Good afternoon.		7	the sound of the metal cling on the ground. He said that that
8 MS. CASTRO: I want to start off by thanking you for		8	is the most unmistakable sound that he knows for a fact that
9 your careful attention that you paid throughout the course of		9	that's the sound of a gun hitting the ground. He's been
10 this trial. On behalf of my client, Police Officers Michael		10	consistent throughout his testimony in saying that.
11 Burbridge and Salim Randall, as well as my co-counsel, we		11	Now, the second reason he wants to attack Officer
12 would like to thank you for the careful attention that you		12	Randall's credibility is because of his paperwork, his arrest
13 will also give to your deliberations in deciding this case.		13	paperwork, to be specific. And he spent a lot of time harping
14 Now, I do have some remarks that I want to go		14	on the detail section of the arrest report. He wants you to
15 through and discuss our case, but I want to start off by		15	believe that that section was left blank, that was his word,
16 addressing some of the points that were made by plaintiff's		16	that was counsel's word, that he left that section blank, that
17 counsel in his summation a little while ago.		17	he didn't put any information about what happened.
18 Now, first off, with respect to Officer Randall,		18	Now, he didn't show you that paperwork during
19 plaintiff's counsel started off by trying to attack his		19	summation, but it was admitted into evidence and you're going
20 credibility. He wanted you to believe that he's not a		20	to have a chance to review it. Now, that arrest report is
21 credible witness and he gave you a few reasons for that. One		21	Plaintiff's Exhibit 6. And the detail section, if you look at
22 of the first reasons he gave you is because he says that there		22	it, says at TPO, which is time, place of occurrence, above
23 are inconsistencies in his testimony.		23	defendant named Joshua Marshall was found in the possession of
24 Now, as plaintiff's counsel went through and told		24	a loaded firearm, and it even specifies a serial number.
25 you repeatedly, this happened four years ago. Four years ago		25	That's not blank. That's a play on his words. And it's a

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PROCEEDINGS	73	PROCEEDINGS	74
1 "ANSWER: That is correct."		1 that refresh your memory that you told Ms. Phillips that you	
2 Well, what part of that is unclear? He was asked		2 never saw this gun in his possession?"	
3 point blank whether he ever saw it in his physical possession,		3 "No, it doesn't refresh my memory. I never said	
4 and he said no. He agreed it was correct. Now, if he never		4 that."	
5 saw this object in the physical possession of Mr. Marshall,		5 Well, of course, he can't admit saying it. If he	
6 why did he swear under oath to a grand jury that he did see		6 admits he told prosecutor number two that he didn't see the	
7 it? I mean, those two stories aren't true; either you saw it,		7 gun in Marshall's possession, then what he told prosecutor	
8 or you didn't. Why did he tell the district attorney that he		8 number one was a lie. What he told the grand jury was a lie	
9 saw this gun in the actual possession of Mr. Marshall?		9 So he can't admit that he made that statement.	
10 He said those things. And then, he changes his		10 And then, I asked him, I said, "Sir, didn't you also	
11 testimony during the course of these proceedings. It's		11 make a statement to the gun enhancement unit, your fellow	
12 dishonest. The truth came out at his deposition. He never		12 colleagues at the NYPD? Didn't you tell them you didn't see	
13 actually saw the possession. How else do we know that? Think		13 this gun in his possession?"	
14 about some of the statements that he made to other people.		14 "I never said that."	
15 Remember, folks, when I was asking him, I said, "Did you make		15 I said, "Well, that's funny. That's not what you	
16 a statement to another prosecuting attorney that you never saw		16 said at your deposition."	
17 him in possession of a gun?"		17 At your deposition, you said, "Actually, it's	
18 "What, who, what prosecuting attorney? Who are you		18 possible I did say that. I can't really remember."	
19 talking of?"		19 Now, how is it possible, if he's saying these things	
20 I said, "The prosecutor, Judy Phillips; did you make		20 now, he comes in here and he says that Marshall was in	
21 a statement to her? Didn't you tell Ms. Phillips that you did		21 possession of a gun, and yet, at his deposition, he said that	
22 not see that gun in his possession? Didn't you tell her		22 he wasn't. He tells this prosecutor, the second prosecutor,	
23 that?"		23 he wasn't. And he tells the gun enhancement unit he wasn't	
24 "I never said that."		24 Three different times, he said he wasn't. But you're supposed	
25 Then, I show him a document. And I said, "Sir, does		25 to believe, the one time that he told the first D.A., that	
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PROCEEDINGS	75	PROCEEDINGS	76
1 that's the true statement.		1 a court of law. What he told that grand jury is a lie. And	
2 This whole case, it's about credibility. Your		2 the truth only came out when we started this civil lawsuit	
3 job -- I told you this in opening statement -- it requires the		3 under oath.	
4 highest level of concentration to put together the pieces.		4 What's the next thing he says? He says he actually	
5 This isn't going to be easy. You have to work through this		5 saw with his own eyes -- he's certain about this, too, there's	
6 evidence logically, think about these things. Why something		6 no mistake. He saw Marshall actually toss the gun away. Sure	
7 on such a critical fact, how does that change over time?		7 you did, Officer, just like you saw Mr. Marshall's eyes	
8 What's the next thing that he says? The next thing		8 bulging from 150 feet away across the street in the dark,	
9 he tells you, he tells you that he saw Marshall pull out the		9 right? Let's think about it. What actually did this man see?	
10 gun. He saw him pull out the object from his waist. That's		10 He's sitting in the back seat of a car. He's got a driver in	
11 funny. That's not what you said at your deposition, Officer.		11 front of him, he's got a passenger in front of him. He's up	
12 At your deposition, you said you didn't see any object pulled		12 to 25 feet away. And Marshall's back is towards him. How	
13 out of his waist.		13 exactly is he seeing this?	
14 And again, don't rely on what I'm telling you.		14 Of course, it doesn't make sense. That's why they	
15 Let's look at the actual evidence. This is on Page 33 of this		15 have to change the story ever so slightly. The story is	
16 man's deposition under oath. "QUESTION: The object that you		16 changed so that there's an angle and Marshall kind of twists,	
17 saw him pull out of his pants?		17 Does that make sense? He's going to twist. Marshall's trying	
18 "ANSWER: I didn't see the object as he pulled it		18 to throw the gun away and hide it because he sees the police	
19 out of his pants."		19 coming. But here, Officer, look what I have, a gun. I'm	
20 So if you didn't see the object as he pulled it out		20 throwing it into the street. Does that make sense? You have	
21 of his pants, why did you tell the grand jury under oath that		21 to use your common sense here. So much of this case is	
22 you saw him pull a firearm out of his pants? That's a lie.		22 thinking through the evidence and using logic and deductive	
23 He lied. Now, you folks have the power. You can just look		23 reasoning to work through it and figure out what's true and	
24 the other way. And you can let him say it doesn't matter,		24 what's not true. His whole story doesn't make sense.	
25 these things happen, or you can hold him accountable. He's in		25 But what's even more telling, look at the paperwork.	
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PROCEEDINGS	77	PROCEEDINGS	78
1 This man's the arresting officer. Now, he said at his		1 They hadn't quite come up with exactly how they were going to	
2 deposition he has no idea why he's the arresting officer. To		2 present this story. He didn't have those details. So that	
3 this day, he had no idea. But he's the arresting officer.		3 section of the report's blank. I asked him also, "What about	
4 Look at his arrest paperwork. He gives a version, he fills		4 the complaint report? You didn't mention anything on the	
5 out the form. There's a section on the form that actually is		5 complaint report, did you?"	
6 a box called "DETAILS." I said, "Officer, you agree that the		6 "Hey, don't blame me. That's not my complaint	
7 detail of pulling out the gun in the waist; that's an		7 report. You know, we all worked on that together. I didn't	
8 important fact?"		8 write it."	
9 And he agreed, "Yes, that's important."		9 Actually, you did write it. That's what you said in	
10 "In fact, it's very important, right?"		10 your deposition. I said, "Who prepared this report?"	
11 "Yes, it's very important."		11 "I did." He prepared the complaint report. Then,	
12 "But why isn't it anywhere in your report?"		12 he starts telling me, "Well, you see, it's so busy. We have	
13 Now, in his deposition, he said "no particular		13 all these documents we have to fill out and all these reports.	
14 reason," but now he came into you, because he has to explain		14 We all have to help each other out."	
15 it. It's going to look foolish, right? How is he going to		15 Really? What other documents? We've seen these	
16 explain this? He explains, "Actually, we don't really fill		16 documents generated; an arrest report, complaint report and	
17 out that section. You know, we just kind of pass it on to the		17 memo book entry. It's not like they didn't have enough time	
18 D.A."		18 The man got six hours of overtime. He filled out a report.	
19 Really? Then why is there a section that says		19 He just doesn't want to own it because it makes him look bad	
20 "DETAILS" in large, capital letters? Why is it on the police		20 because there's no explanation for why he didn't have those	
21 report if you don't fill it out? These are the most important		21 details in.	
22 details of the entire case, that you saw him pull out the gun		22 But my personal favorite, the best one, was the last	
23 and toss it. And you didn't put that on your report?		23 one in the memo book entry. Does anyone here remember what	
24 I'll tell you why he didn't put it on the report,		24 this man said at his deposition? He said he didn't know what	
25 because at that point in time, he didn't have the details.		25 a memo book entry was for. This is an officer who's been on	
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PROCEEDINGS	79	PROCEEDINGS	80
1 the force for eight years. Eight years, testifying under oath		1 So what he was selling to that grand jury, he was	
2 in a deposition that he doesn't know what he's supposed to do		2 trying to make it sound like, man, I had this guy in my line	
3 with a memo book. Come on, are you folks buying this? Are		3 of vision. He's standing there right in front of me. I saw	
4 you going to buy this? There's no way this man is telling the		4 the whole thing. Then, all of a sudden, actually, come to	
5 truth in this case. It's one false, phony, dishonest claim		5 think of it, I wasn't standing in front of him on the	
6 after another.		6 sidewalk. That never happened. Actually, come to think of	
7 You can just look the other way and let it go if you		7 it, I was inside of a car 10 feet away still inside the car	
8 want, or you can hold him accountable. In our system, when		8 when he threw the gun.	
9 you testify under oath, it's serious business. This isn't		9 Well, which is it? First, this isn't a game you can	
10 just playing fast and loose with the facts, change the story		10 play with somebody's liberty and make up stories. How could a	
11 if you don't like your answer last year at the deposition.		11 story change so dramatically? This man's not taking this at	
12 Just come in here. The jury won't know. They weren't there.		12 all seriously, understanding that when he testified in front	
13 Come on, you folks know this. This is not right what he did.		13 of the grand jury, he's under oath to tell the truth.	
14 And you go beyond and you look at the other witness		14 And his paperwork is also an illustration of how the	
15 that we heard from, Officer Burbridge. Do you realize that		15 false and dishonest claims come in. Remember his form he	
16 this man told two completely different stories? When he		16 filled out, his stop-and-frisk form? That form, he said, "I	
17 appeared before the grand jury, one story. When he appeared		17 observed furtive movements before we made the stop."	
18 in the civil lawsuit, another story.		18 Actually, that's not what you said in your deposition. At	
19 Let's look at story number one. This is what he was		19 your deposition, you said you didn't observe anything	
20 telling to the grand jury. He testified under oath in front		20 suspicious.	
21 of that grand jury that what happened was he had this		21 And here's what he said, Page 66: "QUESTION: Did	
22 conversation with Marshall that he said, "Sir, can I talk to		22 you observe any furtive movements by Joshua Marshall before	
23 you for a minute?" And then, what he did was he stepped out		23 you decided to stop him?	
24 of his car in front of Marshall, and that's when Marshall		24 "ANSWER: No."	
25 threw the gun.		25 So if the answer to that is no, why did you lie in	
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PROCEEDINGS	93	PROCEEDINGS	94
1 these two Defendants.		1 a quarter after one. Don't discuss the case.	
2 MS. CASTRO: Objection.		2 (The jury exited.)	
3 MR. NORINSBERG: You can send a message.		3 THE COURT: You have the jury charge with all the	
4 THE COURT: You may continue your argument.		4 corrections. And we've run off copies for the jury later.	
5 MR. NORINSBERG: You can send a message through		5 enjoy your lunch. I'll see you at 1:15.	
6 verdict, not just to these two Defendants, but to any other		6 (A lunch recess was taken.)	
7 police officer out there that thinks it's okay to get in front		7 (Continued on the next page.)	
8 of a grand jury and lie. You can send a message to any		8	
9 other police officer out there that thinks it's okay.		9	
10 THE COURT: Strike that reference to before the		10	
11 grand jury.		11	
12 MR. NORINSBERG: You can send a message to another		12	
13 police officer that thinks it's okay to tell a prosecutor		13	
14 something that's completely false, and say, you know what, you		14	
15 can't do that. You actually cannot do that in our system.		15	
16 You will be accountable. And that's what we're going to ask		16	
17 you to do at the end of the day is listen to all of the		17	
18 evidence, work through it carefully. But if you do that and		18	
19 you honor the pledges you made in your jury selection, you're		19	
20 going to get the right result, and that's to hold these two		20	
21 Defendants responsible for putting this man in jail for four		21	
22 and a half months. Thank you.		22	
23 THE COURT: Thank you. Lunch will be up at 1:30.		23	
24 Do you want to take a break now, and then get back here at		24	
25 about quarter after one, take a break now? We'll continue at		25	
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PROCEEDINGS	95	PROCEEDINGS	96
1 (Honorable Jack B. Weinstein takes the bench.)		1 is a long time to remember every single detail of what	
2 (Jury is in the courtroom at 1:20 p.m.)		2 occurred. However, the evidence has shown that Officer	
3 THE COURT: Be seated, please. Proceed.		3 Randall is consistent in the important facts of this case. He	
4 CLOSING STATEMENT BY THE DEFENSE		4 knows what he saw and he knows what he heard. He knows that	
5 MS. CASTRO: Good afternoon, ladies and gentlemen.		5 he saw the plaintiff pull an object out of his waistband, make	
6 JURORS: Good afternoon.		6 a pitching motion, and he tossed it. He knows that he heard	
7 MS. CASTRO: I want to start off by thanking you for		7 the sound of the metal cling on the ground. He said that that	
8 your careful attention that you paid throughout the course of		8 is the most unmistakable sound that he knows for a fact that	
9 this trial. On behalf of my client, Police Officers Michael		9 that's the sound of a gun hitting the ground. He's been	
10 Burbridge and Salim Randall, as well as my co-counsel, we		10 consistent throughout his testimony in saying that.	
11 would like to thank you for the careful attention that you		11 Now, the second reason he wants to attack Officer	
12 will also give to your deliberations in deciding this case.		12 Randall's credibility is because of his paperwork, his arrest	
13 Now, I do have some remarks that I want to go		13 paperwork, to be specific. And he spent a lot of time harping	
14 through and discuss our case, but I want to start off by		14 on the detail section of the arrest report. He wants you to	
15 addressing some of the points that were made by plaintiff's		15 believe that that section was left blank, that was his word,	
16 counsel in his summation a little while ago.		16 that was counsel's word, that he left that section blank, that	
17 Now, first off, with respect to Officer Randall,		17 he didn't put any information about what happened.	
18 plaintiff's counsel started off by trying to attack his		18 Now, he didn't show you that paperwork during	
19 credibility. He wanted you to believe that he's not a		19 summation, but it was admitted into evidence and you're going	
20 credible witness and he gave you a few reasons for that. One		20 to have a chance to review it. Now, that arrest report is	
21 of the first reasons he gave you is because he says that there		21 Plaintiff's Exhibit 6. And the detail section, if you look at	
22 are inconsistencies in his testimony.		22 it, says at TPO, which is time, place of occurrence, above	
23 Now, as plaintiff's counsel went through and told		23 defendant named Joshua Marshall was found in the possession of	
24 you repeatedly, this happened four years ago. Four years ago		24 a loaded firearm, and it even specifies a serial number.	
25		25 That's not blank. That's a play on his words. And it's a	
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PROCEEDINGS	129	PROCEEDINGS	130
1 Yes or no.		1 MS. SANDS: Your Honor --	
2 Did Officer Burbridge falsely arrest the plaintiff?		2 THE COURT: Do you wish to see me at the side bar?	
3 Yes or no.		3 MS. SANDS: I do.	
4 Did Officer Randall maliciously prosecute the		4 THE COURT: Come to the side bar.	
5 plaintiff? Yes or no.		5 (At the bench.)	
6 Did Officer Burbridge maliciously prosecute the		6 MS. SANDS: Your Honor, I think you misread the	
7 plaintiff? Yes or no.		7 question 3A.	
8 Did Officer Randall violate the plaintiff's		8 THE COURT: You're turning to page?	
9 constitutional right to a fair trial by knowingly presenting		9 MS. SANDS: Page 13, question 3A.	
10 false evidence to the prosecutor? I'm sorry, in preparation		10 (In open court.)	
11 for the grand jury.		11 THE COURT: 3A on Page 13 reads: Did Officer	
12 Did officer Burbridge violate plaintiff's		12 Randall violate plaintiff's constitutional right to a fair	
13 constitutional right to a fair trial by knowingly presenting		13 trial by knowingly presenting false evidence to the prosecutor	
14 false evidence to the prosecutor under similar circumstances?		14 under the circumstances I described? Yes or no.	
15 If your answers to all those questions is no, you		15 MS. SANDS: Okay.	
16 don't have to answer any of the following questions because		16 THE COURT: No other objections are made.	
17 there won't be any damages to assess. If you find that a		17 Swear the marshal, please.	
18 defendant is or has violated a right, then you'll determine		18 THE CLERK: Do you swear or affirm that you will	
19 compensatory damages first attributable to Officer Burbridge?		19 keep the jurors sworn in this cause together in some private	
20 second, attributable to Officer Randall. Then, if you find		20 and convenient place, that you shall suffer no one to speak to	
21 punitive damages, how much against Officer Burbridge --		21 them nor shall you speak to them unless it be at the direction	
22 Officer Randall, rather, and then against Officer Burbridge?		22 of the court to ask if they have agreed upon a verdict?	
23 Do any attorneys wish to see me at the side bar?		23 THE MARSHAL: I do.	
24 MR. NORINSBERG: No, your Honor.		24 THE COURT: Thank you.	
25 MS. CASTRO: No, your Honor.		25 Continue your deliberations until I tell you to	

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PROCEEDINGS	131	PROCEEDINGS	132
1 stop. Now, if you want to go beyond 4:30 p.m., send in a		1 the list, please. Gather all of the exhibits. Nothing is to	
2 note.		2 go in until I go through it.	
3 (The jury exited.)		3 MR. COHEN: You have all the exhibits that we put	
4 THE COURT: The instructions I read from, which we		4 in.	
5 just distributed, is Court Exhibit 2, I think, of today's		5 THE COURT: Make up your list and put it all	
6 date. The brief is marked 1, and this jury charge I gave is		6 together.	
7 marked Exhibit 2.		7 I should say I appreciate the cooperation and fine	
8 (Court Exhibit 1 was received in evidence, as of		8 professional lawyering of both sides.	
9 this date.)		9 MS. GROSS: Thank you, your Honor.	
10 (Court Exhibit 2 was received in evidence, as of		10 MR. COHEN: Thank you, your Honor.	
11 this date.)		11 If I can make one request. Once the jury does have	
12 THE COURT: And we have prior drafts. There is a		12 a verdict, we would like to speak to them.	
13 April 24th draft, which is marked Exhibit 3.		13 THE COURT: You're free to do so. It's up to them	
14 (Court Exhibit 3 was received in evidence, as of		14 whether they want to talk to you.	
15 this date.)		15 MR. COHEN: Can you just ask them if they want to	
16 THE COURT: There's an April 20th draft which is		16 stick around, to let them know that the attorneys would like	
17 marked 4.		17 to --	
18 (Court Exhibit 4 was received in evidence, as of		18 THE COURT: I will tell them. Yes, I will do that	
19 this date.)		19 MS. GROSS: Defendants join in that request.	
20 THE COURT: And there's an April 17th draft, which		20 THE COURT: I will do that.	
21 is marked 5.		21 (Recess.)	
22 (Court Exhibit 5 in evidence, was received as of		22 THE COURT: Yes, what can I do to help you?	
23 this date.)		23 MS. CASTRO: We've gathered all of the exhibits and	
24 THE COURT: Do you have a list of the witnesses,		24 created a witness list.	
25 please? Do you have a list of the exhibits, please? Make up		25 THE COURT: May I see the witness list, please.	

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TRIAL TRANSCRIPT, DATED APRIL 26, 2012
(pp. A1300-A1325)

REPRODUCED FOLLOWING

A1301

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----x
4 JOSHUA MARSHALL,
5 Plaintiff,

6 versus

10-CV-02714 (JBW)

7 THE CITY OF NEW YORK,
8 Defendant.

United States Courthouse
Brooklyn, New York

-----x
April 26, 2012
11:30 A.M.

***VOLUME III**

CONTINUED TRANSCRIPT OF TRIAL
Before: HON. JACK B. WEINSTEIN,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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PROCEEDINGS

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6 Proceedings recorded by computerized stenography. Transcript
7 produced by Computer-aided Transcription.
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PROCEEDINGS

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1 (In open court.)

2 COURTROOM DEPUTY: All rise. The United States
3 District Court for the Eastern District of New York is now is
4 session. The Honorable JACK B. WEINSTEIN is now presiding.

5 (Honorable JACK B. WEINSTEIN takes the bench.)

6 COURTROOM DEPUTY: Calling civil trial proceedings
7 in Docket no. 10-CV-2714, Joshua Marshall against The City of
8 New York.

9 THE COURT: The jury is here?

10 THE CLERK: Yes, Judge.

11 THE COURT: Tell them to deliberate.

12 We have a motion from the defendants. I'll be happy
13 to hear you.

14 File the memorandum with Exhibits A and B that was
15 furnished this morning to the Court and I assume to opposing
16 counsel.

17 MR. NORINSBERG: Yes, your Honor.

18 MS. GROSS: Good morning, your Honor.

19 The defendants for light of what we believe to be
20 the extensive and pervasive nature of the prejudice on several
21 grounds.

22 First, we believe that the jury now has an incorrect
23 instruction with respect to the relationship between
24 compensatory and punitive damages. We believe that under the
25 Kurman Robinson and State Farm cases, it's an incorrect

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PROCEEDINGS

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1 statement of law to say that they may award punitive damages
2 in the absence of first awarding compensatory damages.

3 Moreover, because the Court has now given two
4 instructions with respect to the relationship between
5 compensatory and punitive damages, it's the defendants'
6 position that no curative instruction may reasonably be given.

7 Second, it's the defendants' position that the Court
8 misstated the law with respect to plaintiff's psychological or
9 emotional damages. He's not seeking psychological or
10 emotional damages. He testified as such at defendants'
11 deposition. During the pre-charge conference, the jury charge
12 read that the Court would instruct the jury that plaintiff
13 claims as the injury he spent four and a half months in jail,
14 he's not seeking any recovery for any emotional or
15 psychological injuries, he's not seeking recovery for loss of
16 earnings, but then during the charge the Court read he's not
17 seeking recovery for any emotional or psychological injuries,
18 that is, for any emotional or psychological injuries that
19 continued after the jail. He's seeking damages from the time
20 he spent in jail.

21 He is seeking damages for loss of liberty. It's our
22 position that he has abandoned his claim of emotional or
23 psychological injuries both with respect to time after his
24 time of incarceration and with respect to his actual time of
25 incarceration. A loss of liberty is a separate and

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1 independent ground upon which the Court -- the jury may award
2 damages.

3 Third, plaintiff was improperly permitted to ask the
4 jury to send a message, not just to these defendants but to
5 all putative malfeasors. Under the law, we believe that's
6 impermissible.

7 Fourth, because the defendants were precluded from
8 introducing evidence of plaintiff's prior incarcerations, any
9 the damage award would be speculative under the Benucci case
10 decided by the Eastern District.

11 Fifth, plaintiff repeatedly and properly argued
12 during his closing argument that defendants made misleading
13 statements to the grand jury. Such statements would not be a
14 proper basis of liability under the Rehberg case.

15 Sixth, the Court misread the jury charge with
16 respect to defendants' potential liability for testimony
17 before the grand jury in contravention of Rehberg. It made a
18 clarifying statement, but we believe the confusion is
19 irreparable.

20 And finally, your Honor, defendants have not had a
21 chance to review the transcript in great detail, but we do
22 object insofar as we believe plaintiff's counsel referenced
23 city lawyers in his closing argument or leading up thereto.
24 We have not located it in the transcript.

25 THE COURT: Do you want me to instruct the jury on

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1 that matter? I don't think it made any impression on anybody.
2 But if I now bring it to their attention or if I brought it to
3 their attention at the time, it would emphasize what nobody
4 considered of any importance in the courtroom.

5 What do you wish me to do?

6 MS. GROSS: We do not wish a curative instruction on
7 that point. We agree that it would draw unnecessary attention
8 to it. We do note that we do object to the fact they said it,
9 and we believe that prejudice resulted.

10 Finally, defense would request that the special
11 interrogatory sheet that was submitted be given to the jury
12 after it reaches its verdict.

13 THE COURT: Thank you very much.

14 What is the position of the plaintiffs?

15 MR. NORINSBERG: Your Honor, we believe that the
16 Court directly addressed the question that was raised by the
17 jury and really extensively explained it and made it clear to
18 the jury what the proper standard would be and that they would
19 indeed need to find liability first before they could award
20 any type of punitive damages.

21 I'm really not at all sure what else the Court could
22 have possibly said that would have clarified it any further.
23 In fact, we received a second note from the jury where they
24 explained that the Court's -- the Court's discussion of the
25 issue had removed the confusion that had been there

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1 beforehand. So we just don't see any issue with that at all.

2 MR. COHEN: I'll add just a little bit to that
3 point.

4 Your Honor did explain to the jury -- and I think
5 this is where the confusion stemmed from. Because your Honor
6 stated there was no lost wages and there were no psychological
7 or emotional damages, the jury was a little lost at what the
8 compensatory damages could be. And the court properly stated
9 that loss of liberty was what was -- that the injury that the
10 plaintiff was seeking for those compensatory damages, without
11 telling the jury that they should be finding loss of liberty
12 damages, you just explained to the jury what the type of
13 injury -- that would justify a compensatory damage award.

14 MR. NORINSBERG: With respect to the send a message
15 portion of my summation, which I had addressed before I did
16 the summation, it's limited strictly to punitive damages. The
17 nature of punitive damages is exactly that. It's to deter
18 this conduct from occurring again in the future. It is not
19 limited to the actual tortfeasors. The whole concept behind
20 punitive damages is that it extends to others similarly
21 situated to make sure that they don't engage in the same
22 improper behavior. So I feel that that argument is really not
23 a sound argument under the law.

24 To be clear, the statements that I made with regard
25 to false and misleading statements to the grand jury, it's

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1 very clear under the law, as it stands right now, regardless
2 of Rehberg, that there's still a presumption that is created
3 through the indictment. I believe that was expressly
4 mentioned in the charge at the request of the defendants.
5 There's a presumption that needs to be overcome. One of the
6 ways of overcoming that presumption is to indicate that, in
7 fact, the officers made false and misleading statements to the
8 grand jury and that -- in that context, that's what those
9 remarks were for. They also were used to establish
10 credibility, which is the key issue in this entire case. So
11 to the extent that there are references to false testimony
12 that was given to the grand jury, it is for those two
13 purposes, to overcome the presumption, one, and two, to
14 address the general issues of credibility.

15 THE COURT: A limiting instruction was not requested
16 by defendants at that time, was it? Is that correct?

17 MS. GROSS: I'm not sure what the record is with
18 respect to that part, your Honor.

19 THE COURT: My recollection is there was no request
20 for a limiting instruction.

21 MR. NORINSBERG: That's my recollection as well.

22 THE COURT: However, the record will speak for
23 itself.

24 MR. NORINSBERG: Not only that, the Court's
25 charge itself --

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1 THE COURT: Excuse me. I believe a limiting
2 instruction at this late date would not be desirable.

3 MR. NORINSBERG: And the Court's instruction itself
4 expressly states that it's not a basis for liability to say
5 that they lied to the grand jury. It's in the charge itself.
6 So I really don't see how there's any possibility of the jury
7 misunderstanding that.

8 I just want to state on that issue for a long time
9 police officers have enjoyed complete absolute immunity for
10 trial testimony under Briscoe versus Lahue, which is a Supreme
11 Court case; and for many years, in the same sense, we've been
12 able to use us false testimony at trial for general
13 credibility purposes even though it's not an independent basis
14 of liability under 1983. And I don't think Rehberg changes
15 that at all. It's the same use of testimony which otherwise
16 would not be a basis for liability independently under 1983
17 but nonetheless could still be identified for credibility
18 purposes.

19 THE COURT: I should add that had a request been
20 made for a limitation, I would have so advised the jury to use
21 that on credibility only.

22 MR. NORINSBERG: Lastly, with respect to the request
23 for special interrogatories, it's absolutely inappropriate in
24 this case. As I said during our initial charge conference on
25 April 16th, when we first met to deal with the motions in

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1 limine, there's no basis here for finding qualified immunity.
2 There's a sharp factual dispute. The issue is whether he had
3 a gun or he didn't. The officers repeatedly stated under oath
4 at their depositions and again at trial that they were
5 positive they saw him with a gun. So if the jury were to find
6 that they didn't see him with a gun, that would mean that
7 they're not entitled to qualified immunity. It would mean
8 that they willfully and deliberately lied, in which case there
9 would be no purpose for having these further interrogatories.

10 So while there are circumstances in certain types of
11 cases where additional interrogatories are warranted, that
12 would not be the case in this particular civil action.

13 Thank you, your Honor.

14 THE COURT: Bring in the jury, please.

15 MS. GROSS: Your Honor, may I be heard?

16 THE COURT: Yes, of course.

17 MS. GROSS: May I be heard briefly?

18 THE COURT: Yes.

19 MS. GROSS: I just wanted to emphasize the point
20 that we believe very strongly that the jury now has an
21 incorrect statement of law with respect to the relationship
22 between compensatory and punitive damages. It's our position
23 that the jury cannot award punitive damages in the absence of
24 compensatory damages under State Farm.

25 THE COURT: I understand.

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1 MS. GROSS: Please note our objection to the Court's
2 rulings.

3 THE COURT: To the what?

4 MS. GROSS: To the Court's rulings with respect to
5 the motion.

6 MS. SANDS: Your Honor, I would also like to note
7 for the record our objection to the special interrogatories.
8 I believe under the case of Zelna v. Summerland, Second
9 Circuit case, we are entitled to that.

10 MR. NORINSBERG: I just want to note for the record
11 the Court --

12 THE COURT: Special interrogatories in these kinds
13 of cases are not desirable. They're confusing to the jury.
14 It's a simple case. I'm not going to, at this late stage,
15 after the matter has been fully discussed in connection with
16 the charge, introduce special interrogatories and disturb the
17 deliberations.

18 MR. NORINSBERG: Your Honor --

19 THE COURT: Thank you. Bring in the jury.

20 MR. NORINSBERG: May I just be heard?

21 THE COURT: Yes.

22 MR. NORINSBERG: I just want to say the Court
23 yesterday asked counsel -- they repeatedly state they have
24 objections. The Court asked counsel what they would propose,
25 what additional language should be charged. They failed to

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1 advise the Court of any special additional requests yesterday,
2 and today they haven't come in here with any type of
3 supplemental charge that they believe is appropriate to give
4 to the jury. So the Court gave them an opportunity; they
5 failed to avail themselves of that. I just wanted that on the
6 record.

7 THE COURT: Thank you. Bring in the jury.

8 MS. GROSS: Your Honor, I believe that's an
9 incorrect statement of what our position was yesterday. We
10 expressly said that the initial jury charge was the proper
11 one.

12 THE COURT: Thank you.

13 (The jury entered.)

14 THE COURT: Be seated everyone, please.

15 I've arranged for lunch for 12:45 p.m. You can
16 deliberate right through lunch if you'd like. It won't upset
17 your digestion if you don't. You don't have to talk about it.

18 In going through the transcript this morning, I
19 noticed that it was suggested that you send a message. I
20 don't want you to send any messages. I just want you to
21 decide the case in accordance with my instructions?

22 Do you understand?

23 THE JURY: Yes.

24 THE COURT: That's enough. No messages. Just
25 decide the case.

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1 All right, thank you. Continue deliberations,
2 please.

3 (The jury exited.)

4 MR. NORINSBERG: Your Honor, I just want to place
5 our objection on the record.

6 This issue had been raised this morning by defense
7 counsel, and the Court did not indicate that it was going to
8 give a supplemental charge with respect to this issue. We had
9 no opportunity to be heard or to propose language.

10 THE COURT: I would be delighted to hear your
11 objection and proposed language.

12 MR. NORINSBERG: But it's too late now.

13 THE COURT: Sit down.

14 MR. NORINSBERG: It's too late. I mean, you just
15 gave them a supplemental charge on it.

16 THE COURT: Do you wish to put something on the
17 record to show what you would have asked for? If you do, I'm
18 giving you the opportunity to do so.

19 MR. NORINSBERG: We would've asked -- if the Court
20 was inclined to give a supplemental instruction on this
21 particular issue, which we would've objected to had we known
22 the Court was going to do it, we would've asked the Court to
23 explain that, in fact, under the law with respect to punitive
24 damages and only with respect to punitive damages, it is
25 appropriate that their verdict would be used for the purpose

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1 of sending a message because that's the purpose of punitive
2 damages, is to deter future similar conduct. However, that
3 language would not apply to compensatory damages. That's what
4 we would have asked the Court to clarify.

5 So we feel what was just told to the jury is
6 actually not correct under the law.

7 THE COURT: The charge reads at Page 11, and I think
8 it's accurate: If you award compensatory damages, you may
9 award additional punitive damages if you find that a defendant
10 engaged in extraordinary misconduct. I elaborated and
11 corrected, if it needed corrected, the first sentence.

12 Second sentence: You may do so to express your
13 disapproval and "to serve as an example or warning to others
14 who might otherwise engage in similar conduct."

15 That sufficiently states the proposition without
16 having the jury think about messages.

17 Anything further? Let Ms. Lowe know where you can
18 be reached.

19 (Whereupon, a break was taken.)

20 THE COURT: Mark the brief as Court Exhibit 1 of
21 today.

22 (A Brief with attachment was marked as Court Exhibit
23 1 was received in evidence, as of this date.)

24

25 (Court Exhibit 2 was received in evidence, as of

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1 this date.)

2 THE COURT: Court Exhibit 2.

3 We have reached a verdict.

4 Sit down everybody, please.

5 Madam clerk, take the verdict, please.

6 (The jury entered.)

7 THE CLERK: Will the foreperson please rise.

8 Did Officer Randall falsely arrest the plaintiff on
9 May 15th, 2008? Yes or no.

10 THE FOREPERSON: Yes.

11 THE CLERK: Did Officer Burbbridge falsely arrest the
12 plaintiff on May 15th, 2008. Yes or no.

13 THE FOREPERSON: Yes.

14 THE CLERK: Did Officer Randall maliciously
15 prosecute the plaintiff? Yes or no?

16 THE FOREPERSON: Yes.

17 THE CLERK: Did Officer Burbbridge maliciously
18 prosecute the plaintiff? Yes or no?

19 THE FOREPERSON: Yes.

20 THE CLERK: Did Officer Randall violate plaintiff's
21 constitutional rights to a fair trial by knowingly presenting
22 false evidence to the prosecutor? Yes or no.

23 THE FOREPERSON: Yes.

24 THE CLERK: Did Officer Burbbridge violate
25 plaintiff's constitutional rights to a fair trial by knowingly

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1 presenting false evidence to the prosecutor? Yes or no.

2 THE FOREPERSON: Yes.

3 THE CLERK: What amount of money is necessary to
4 compensate the plaintiff for his injuries proximately caused by
5 a violation of one or more of his rights by Officer Randall,
6 compensatory damages?

7 THE FOREPERSON: \$70,000.

8 THE CLERK: What amount of money, if any, is
9 necessary to compensate the plaintiff for his injuries
10 proximately caused by violation of one or more of his rights by
11 Officer Burbridge, compensatory damages?

12 THE FOREPERSON: 70,000.

13 THE CLERK: If damages are awarded pursuant to
14 question 4A and the plaintiff is entitled to punitive damages
15 from Officer Randall, what amount of punitive damages for
16 breach of plaintiff's constitutional rights is awarded from
17 Officer Randall, punitive damages?

18 THE FOREPERSON: \$25,000.

19 THE CLERK: If damages are awarded pursuant to
20 question 4B and the plaintiff is entitled to punitive damages
21 from Officer Burbridge, what amount of punitive damages for
22 breach of plaintiff's constitutional rights is awarded from
23 Officer Burbridge?

24 THE FOREPERSON: \$25,000.

25 THE COURT: Poll the jury.

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1 Thank you. You may sit down.

2 Poll the jury, please.

3 THE CLERK: Did Officer Randall falsely arrest the
4 plaintiff on May 15th, 2008? Yes.

5 Did Officer Burbridge falsely arrest the plaintiff
6 on May 15th, 2008? Yes.

7 Did Officer Randall maliciously prosecute the
8 plaintiff? Yes.

9 Did Officer Burbridge maliciously prosecute the
10 plaintiff? Yes.

11 Did Officer Randall violate plaintiff's
12 constitutional right to a fair trial by knowingly presenting
13 false evidence to the prosecutor? Yes.

14 Did Officer Burbridge violate plaintiff's
15 constitutional right to a fair trial by knowingly presenting
16 false evidence to the prosecutor? Yes.

17 What amount of money, if any, is necessary to
18 compensate the plaintiff for his injuries proximately caused by
19 violation of one or more of his rights by Officer Randall?
20 Compensatory damages, \$70,000.

21 What amount of money, if any, is necessary to
22 compensate the plaintiff for his injuries proximately caused by
23 a violation of one or more of his rights by Officer Burbridge?
24 Compensatory damages, \$70,000.

25 If damages are awarded pursuant to question 4A and

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1 the plaintiff is entitled to punitive damages from Officer
2 Randall, what amount of punitive damages for breach of
3 plaintiff's constitutional rights is awarded from Officer
4 Randall? Punitive damages, \$25,000.

5 If damages are awarded pursuant to question 4B and
6 the plaintiff is entitled to punitive damages from Officer
7 Burbridge, what amount of punitive damages for breach of
8 plaintiff's constitutional rights is awarded from Officer
9 Burbridge? Punitive damages, \$25,000.

10 Juror Number 1, is that your verdict?

11 THE JUROR: Yes.

12 THE CLERK: Juror Number 2, is that your verdict?

13 THE JUROR: Yes.

14 THE CLERK: Juror Number 3, is that your verdict?

15 THE JUROR: Yes.

16 THE CLERK: Juror Number 4, is that your verdict?

17 THE JUROR: Yes.

18 THE CLERK: Juror Number 5, is that your verdict?

19 THE JUROR: Yes.

20 THE CLERK: Juror Number 6, is that your verdict?

21 THE JUROR: Yes.

22 THE CLERK: Juror Number 7, is that your verdict?

23 THE JUROR: Yes.

24 THE CLERK: Juror Number 8, is that your verdict?

25 THE JUROR: Yes.

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1 THE CLERK: Juror Number 9, is that your verdict?

2 THE JUROR: Yes.

3 THE CLERK: Juror Number 10, is that your verdict?

4 THE JUROR: Yes.

5 THE CLERK: Juror Number 11, is that your verdict?

6 THE JUROR: Yes.

7 THE CLERK: Juror Number 12, is that your verdict?

8 THE JUROR: Yes.

9 THE CLERK: Jury has been polled, your Honor.

10 THE COURT: Is there any reason why the jury should
11 not now be discharged?

12 MR. NORINSBERG: No, your Honor.

13 MS. GROSS: No, your Honor.

14 THE COURT: Thank you very much. You're discharged.

15 You may talk to the attorneys or not, as you wish,
16 or anybody else, but don't indicate what anybody else said on
17 the jury. Is that clear? Each of you is entitled to your
18 privacy. If you want to talk, you can, but not about other
19 jurors' views.

20 Thank you very much for your help. Good night.

21 (The jury exited.)

22 THE COURT: Any motions?

23 MS. SANDS: Your Honor, defendants reserve the right
24 to make all the post-trial motions that they think are
25 appropriate in this case.

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1 THE COURT: Yes.

2 Nothing else then? Thank you very much.

3
4 **CERTIFICATE OF REPORTER.**

5 I certify that the foregoing is a correct transcript of the
6 record of proceedings in the above-entitled matter.

7
8 _____
9 Judi Johnson, RPR, CRR, CLR
10 Official Court Reporter
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